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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CAR CARRIERS, INC., et al.,

Petitioners,

v.

FORD MOTOR COMPANY and NU-CAR CARRIERS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a plaintiff in a private antitrust action under Section 1 of the Sherman Act must allege not only an injury to himself, but an injury to the market, or public injury, as well?

2. Whether a complaint alleging a combination and conspiracy between Ford Motor Company and independent transport carriers to eliminate and destroy the transport businesses of petitioners and other carriers states a claim for relief under the antitrust laws?

LIST OF PARTIES

Petitioners, Plaintiffs	*Respondents, Defendants*
Car Carriers, Inc.	Ford Motor Company
Clark Transport Company, Inc.	Nu-Car Carriers, Inc.
Carrier Equipment Co.	
Transco Corporation	
JPB Corporation	
James P. Byrne	
Tykely Investment Co.	

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CAR CARRIERS, INC., et al.,

Petitioners,

v.

FORD MOTOR COMPANY and NU-CAR CARRIERS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on October 2, 1984.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported in 745 F.2d 1101 and printed in Appendix A, *infra*, pp. A. 1-19. The opinion of the District Court is reported in 561 F. Supp. 885 and printed in Appendix A, *infra*, pp. A. 20-30.

JURISDICTION

The opinion of the Court of Appeals was entered October 2, 1984. The petition for rehearing was denied October 30, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1976).

STATUTES AND RULES INVOLVED

The statutory provisions and the rules involved are Section 1 of the Sherman Act, 15 U.S.C. §1; Section 4 of the Clayton Act, 15 U.S.C. §15; and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The foregoing statutes and rules are printed in Appendix B, *infra*, p. A. 50.

STATEMENT

This is a private antitrust action alleging violations of Section 1 of the Sherman Act (15 U.S.C. §1). The District Court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The Court below affirmed.

Petitioners Car Carriers, Inc. ("Car Carriers") and affiliated companies transported new Ford vehicles from Ford's plants and railheads in Chicago from 1968 until terminated in 1981.

The complaint alleged a combination and conspiracy among Ford Motor Company, Inc. ("Ford") and other Ford carriers to eliminate and destroy the transport businesses of "target" carriers, with the object of enabling the co-conspirator carriers to acquire these businesses (and assets) at distress prices (Complaint ¶19; A. 36-37). In furtherance of this scheme, petitioners (and other target carriers) were required to invest heavily in new transport equipment and terminal facilities; at the same time Ford denied approval of necessary tariff increases to amortize the cost of these capital expenditures (Complaint ¶¶19, 20; A. 36-37; 38-40). On the other hand, co-conspirator carriers were allowed tariff increases, as well as temporary rate adjustments, to compensate for their increased costs (Complaint ¶19; A. 36-37).

The complaint alleged that petitioners were terminated in October, 1981 in furtherance of this combination and conspiracy and that Ford's Chicago transport business was awarded to defendant Nu-Car Carriers, Inc. ("Nu-Car") on the basis of "a sham and knowingly predatory bid" (Complaint ¶20; A. 38-40). Thereafter, as a consequence of the combination and conspiracy, petitioners were prevented from selling at market value either their transport equipment or terminal facility to Nu-Car or other Ford carriers (Complaint ¶¶20, 23; A. 38-40; 40-41). The complaint sought damages in the sum of five million dollars ($5,000,000.00) (A. 41).

Defendants moved to dismiss the complaint for failure to state a claim pursuant to Rule 12(b)(6). The District Court granted the motion holding that plaintiffs lacked "antitrust standing" because the complaint failed to allege the requisite "anticompetitive harm." The Court concluded that all that was involved was the substitution of a low cost carrier for a high cost carrier—"a procompetitive

benefit" (A. 26-27).[1] As to the alleged collective refusal to purchase petitioners' assets except at distress prices, the Court observed that this "injury unquestionably flowed from the procompetitive aspects of the claimed boycott":

> By allegedly precluding [petitioners] from selling their business to *existing* Ford carriers, this joint refusal to deal preserved plaintiffs as a potential rival (or forced them to sell to a new entrant) and thereby intensified competitive pressures in the relevant market.

(A. 28).

The Court below affirmed. Noting that "[t]he purpose of the Sherman Act is to rectify the injury to consumers caused by diminished competition," the Court held, "the plaintiff must allege, not only an injury to himself, but an injury to the market as well" (A. 10, 11). Applying this standard, the Court below found that the complaint allegations neither stated a *per se* offense nor a claim under the Rule of Reason. The Court concluded that the complaint allegations could not appropriately be characterized as stating a *per se* offense because the complaint failed to suggest that the object of the alleged conspiracy was a price-fixing scheme, a tying arrangement, or a market allocation,[2] noting:

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[1] The District Court and the Court below reached this conclusion notwithstanding the contrary allegations that the conspirator carriers, including Nu-Car, and *not petitioners*, received rate increases (Complaint ¶¶19, 20; A. 36-37; 38-40).

[2] Actually, the complaint, fairly read, alleged a market allocation or division of Ford's transport business among the conspirator carriers with the resulting elimination of petitioners and other target carriers.

> To the contrary, the complaint simply states that Ford elected to replace its exclusive haulaway transporter for the Chicago area with another carrier on the grounds that the original carrier continually sought higher prices that Ford was unwilling to pay.

(A. 13).

With respect to the allegations relating to the petitioners' attempt to sell its assets following termination and the alleged boycott on the part of Nu-Car and other Ford carriers, the Court noted that refusals to deal or " 'group boycotts' are considered a *per se* violation only if they are used to enforce agreements that are themselves illegal *per se*" (A. 13). Characterizing the complaint allegations as merely alleging a failure to reach an agreement on the terms of sale, the Court concluded that this was not an appropriate situation for application of the *per se* rule (A. 13-14).

As to the question of whether the complaint stated a claim under the Rule of Reason, the Court reasoned that, "[t]he fatal flaw in these pleadings is the absence of any allegation, either direct or inferential, of an anticompetitive effect" and that "it is the function of §1 to compensate the unfortunate only when their demise is accompanied by a generalized injury to the market" (A. 14). Again, the Court concluded that the clear implication of the complaint allegations was that "Car Carriers was terminated because it continually sought higher tariffs that Ford was unwilling to pay" (A. 15). The allegations that the award to Nu-Car was on the basis of "a sham and knowingly predatory bid" were dismissed as "conclusory statements" and, in any event, without "an anticompetitive effect":

> If Ford and Nu-Car improperly manipulated the bidding process, then Car Carriers may have a claim grounded in tort or contract; the absence of any allegation of an anticompetitive effect prevents these claims from coming within the purview of the antitrust laws.

(A. 16).

Finally, the Court below concluded that the complaint merely states petitioners' commercial disappointment at losing Ford's patronage, noting in the language of its *Havoco*[3] opinion, "it is 'hard to ignore the suspicion that the facts have been forced into an antitrust mold to achieve federal jurisdiction' " (A. 16).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court below directly conflicts with the decisions of this Court in *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Company*, 364 U.S. 656 (1961), *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) and *Radovich v. National Football League*, 352 U.S. 445 (1957). *See also In re McConnell*, 370 U.S. 230 (1962). In holding that a private antitrust plaintiff must allege "not only an injury to himself, but an injury to the market as well," the Court has reincarnated the previously rejected "public injury" requirement.

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[3] *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 559 (7th Cir. 1980).

In *Radiant Burners*, the Seventh Circuit had held the complaint allegations insufficient for failure "to allege such injury to the public as is essential to plaintiff's right to maintain its action." The lower Court had pronounced:

> In the absence of a *per se* violation the Sherman Act protects the individual injured competitor and affords him relief, but only under circumstances where there is such general injury to the competitive process that the public at large suffers economic harm.

Radiant Burners, Inc. v. Peoples Gas, Light & Coke Company, 273 F.2d 196, 200 (7th Cir. 1959). This Court granted certiorari because of petitioner's claim that this holding was contrary to controlling decisions of this Court. 364 U.S. at 659. In a *per curiam* opinion this Court reversed, holding:

> By §1, Congress has made illegal: 'Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states. . . .' * * * Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.

Similarly, in *Klor's*, this Court rejected the notion that a plaintiff had to establish "public injury." The District Court had entered summary judgment on the ground that all that was involved was a "purely private quarrel" between Klor's and Broadway-Hale which did not amount to a "public wrong proscribed by the [Sherman] Act." Affirming, the Court of Appeals for the Ninth Circuit held, "a violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured," *Klor's v. Broadway-Hale Stores, Inc.*,

255 F.2d 214, 233 (9th Cir. 1958). Reversing, this Court first observed:

> The holding if correct, means that unless the opportunities for customers to buy in a competitive market are reduced, a group of powerful businessmen may act in concert to deprive a single merchant like Klor, of the goods he needs to compete effectively.

359 U.S. at 210. The Court concluded by noting that the combination alleged by Klor's, "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy," 359 U.S. at 213.

In *Radovich* petitioner alleged that he was barred from obtaining employment because of an illegal boycott between the NFL and its affiliate the Pacific Coast League to black-list players who had defected to the American Conference. The Ninth Circuit affirmed dismissal of the complaint on the ground that Radovich had not grounded his claim on conduct which was "calculated to prejudice the public or unreasonably restrain interstate commerce" *Radovich v. National Football League*, 231 F.2d 620, 623 (9th Cir. 1956). Again, this Court reversed.

> Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade, * * * and meet the requirement that petitioner has thereby suffered injury. Congress has by legislative fiat determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by the aggrieved party.

352 U.S. at 453.

In *In re McConnell*, this Court added the final word to the discredited public injury concept. Reversing the contempt order, the Court observed:

> At the very outset of trial, however, the district judge on his own motion refused to permit counsel to try to prove their conspiracy charge, holding that they must first prove in a wholly separate trial that defendants' actions had resulted in an economic injury to the public—*an erroneous holding since we have held that the right of recovery of a plaintiff in a treble damage antitrust case does not depend at all on proving an economic injury to the public.*

370 U.S. at 231 (1962) (emphasis supplied), citing to the Court's earlier opinions in *Radiant Burners*, *Klor's* and *Radovich*.

Here, petitioners sufficiently alleged the requisite elements of a private antitrust action: a combination and conspiracy between Ford and other Ford carriers to eliminate and destroy the transport business of petitioners (as well as other "target" carriers); and damage sustained by petitioners as a consequence. The alleged boycott by Nu-Car and other co-conspirator carriers of petitioners' attempted sale of their transport equipment following termination stated a *per se* claim. Contrary to the holding of the Court below, petitioners were not required to allege public injury or "injury to the market as well."

II.

The decision of the Court below conflicts in principle with the decisions of this Court in *Conley v. Gibson*, 355 U.S. 41 (1957) and *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464 (1962).

While acknowledging this Court's statement in *Conley* that a complaint should not be dismissed for failure to state a claim unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," the Court effectively

nullifies this language by observing "*Conley* has never been interpreted literally" (A. 8).

Similarly, the Court discounted this Court's admonition in *Poller* that, "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles," noting that *Poller* and its progeny "simply stand for the proposition that, if a claim under the antitrust laws has been adequately set forth in the complaint, the highly factual and subjective questions of intent and purpose should be resolved after discovery and trial" (A. 8).

Having thus limited *Conley* and *Poller*, the Court below proceeded to construe the complaint allegations in a manner consistent with its (and the District Court's) "procompetitive" conclusion that all that was involved was the substitution of a low cost carrier for a high cost carrier. The Court reached this conclusion notwithstanding the contrary complaint allegation that Nu-Car, not petitioners, was granted rate increases. The allegations that the award of the transport contract to Nu-Car was pursuant to "a sham and knowingly predatory bid" were dismissed as merely "conclusory statements" without factual support (A. 15). The opinion observed that it would be "utterly implausible" and "preposterous" to assume that Ford would conspire against its own economic interest "by accepting Nu-Car's 'predatory' bid so that [Nu-Car] could later charge non-competitive, monopoly prices" (A. 15, 16). To the contrary, a fair and plausible reading of these same allegations is that Ford, pursuant to the combination and conspiracy alleged, manipulated the bidding process to award the contract to Nu-Car on the basis of an unsupportable bid, with the knowledge that Nu-Car would be able to acquire petitioners' transport equipment and terminal facility at a fraction of their real value. The Court's

further contention that such manipulation at most would give rise to a claim in tort or contract ignores the complaint allegations that the manipulation and award was in furtherance of the combination and conspiracy. Finally, the boycott allegations relating to petitioners' unsuccessful attempt to sell their assets following termination were misnomered as alleging simply a failure to reach agreement on the terms of sale (A. 13).

The lower Court's tortured reading and emasculation of the complaint allegations does violence to the precepts announced by this Court in *Conley* and *Poller.*

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion by Judge Eschbach

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

October 2, 1984.

Before

Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. WILLIAM J. JAMESON, *Senior District Judge**

CAR CARRIERS, INC., *et al.*,

Plaintiffs-Appellants,

No. 83-1825 vs.

FORD MOTOR COMPANY and
NU-CAR CARRIERS, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 82 C 7009—**Milton I. Shadur**, Judge.

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* Honorable William J. Jameson, Senior Judge, United States District Court for the District of Montana, sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-1825

CAR CARRIERS, INC., et al.,

Plaintiffs-Appellants,

v.

FORD MOTOR COMPANY and NU-CAR CARRIERS, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 7009—**Milton I. Shadur**, *Judge.*

ARGUED APRIL 9, 1984—DECIDED OCTOBER 2, 1984

Before ESCHBACH and FLAUM, *Circuit Judges*, and JAMESON, *Senior District Judge.**

ESCHBACH, *Circuit Judge.* Essentially two questions are presented by this appeal: (1) whether the district court erred in dismissing the plaintiffs' antitrust complaint for failure to state a claim upon which relief could be granted and (2) whether the district court erred in refusing to allow the plaintiffs leave to amend. For the reasons stated below, we affirm the judgment of the district court on both issues.

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* The Honorable William J. Jameson, Senior District Judge of the United States District Court for the District of Montana, sitting by designation.

I

A

The factual allegations of the complaint, which we must assume are true in considering the propriety of a dismissal for failure to state a claim, are as follows:

Car Carriers, Inc. ("Car Carriers"), its affiliate Clark Transport Co., Inc. ("Clark"), JPB Corp. (the parent of Car Carriers and Clark), James P. Byrne (the controlling shareholder of JPB Corp.), and three other related enterprises[1] initiated this action against Ford Motor Company ("Ford") and Nu-Car Carriers, Inc. ("Nu-Car"). Count I of the six-count complaint alleged a conspiracy in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and sought recovery under §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26; the remaining five counts asserted pendent state-law claims.

From 1968 until October 1981, both Car Carriers and Clark transported new Ford vehicles from Ford's plants and railheads in the Chicago area. Car Carriers, but apparently not Clark, served only Ford. Both transport companies were regulated by the Interstate, as well as the Illinois, Commerce Commissions; thus, their rates were subject to approval by these regulatory agencies. Ford had the power to "dictate[ ] and control[ ]" the rates either by formally opposing any rate increase sought before the agencies or by unilaterally terminating the carrier. Complaint ¶ 19(d)-(g).

As early as 1975, "defendants and their co-conspirators entered into contracts and engaged in a continuing combinations [sic] and conspiracies to restrain trade in the business of providing haulaway motor transportation for new Ford automobiles and to injure or destroy the busi-

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[1] The additional parties are Carrier Equipment Co. ("Carrier"), Transco Corp. ("Transco") (both subsidiaries of JPB Corp.), and Tykely Investment Co. (a limited partnership between Byrne and the members of his family).

nesses of plaintiffs and certain other similarly situated Ford carriers." Complaint ¶ 19. The defendants employed the following methods in implementing their common goal. First, the carrier selected for elimination (the so-called "target carrier") would be required to make substantial investments in new tractor-trailer equipment, real estate, and new terminal facilities. In return, Ford would promise additional transportation traffic and "complete agreement with *increased* tariff rates necessary to pay for these acquisitions." Complaint ¶ 19(b), (c) (emphasis added). After the "target" carriers had made these investments, however, Ford would then prevent them from obtaining the rate increases necessary for profitable operations. Complaint ¶ 19(d), (e).

Second, Ford, with support of other carriers, "[i]nterfered with and prevented [the] target haulaway carriers and their affiliates from selling their businesses and assets as going business concerns or prevented [the] target haulaway carriers from consolidation or merger with other carriers." Complaint ¶ 19(h). Finally, Ford would apparently terminate its relationship with the target carrier at this point, thereby allowing the favored carriers to "acquire the businesses and assets of [the target carriers] at distress prices or for less than fair market value as going business concerns." Complaint ¶ 19(i).

The "destruction" of Car Carriers generally followed the pattern described above, as the complaint relates in detail.[2] In 1975, Ford directed Byrne and Car Carriers to sell the assets and business to a second Ford carrier. After Car Carriers had entered into negotiations for a sale with the E&L Transport Co. ("E&L"), however, Ford "unreasonably interfered with and prevented" the consummation of the agreement by inducing the corporate

[2] We have, of course, provided the facts as presented in the complaint. Notwithstanding the initial general pleadings set out above, our review must focus on the specific allegations relating to the downfall of the plaintiffs.

parent of E&L to repudiate an executed letter of intent. Complaint ¶ 20(a). In 1977 and 1978, Ford induced Car Carriers to purchase over $6,000,000 worth of new tractor-trailer equipment with the promise that Car Carriers "would be able to recover the cost of such equipment with additional transport business and *higher* tariff rates." Complaint ¶ 20(b) (emphasis added). However, during the entire period of 1975 to 1981, Ford caused Car Carriers's operations in Chicago to be unprofitable through its "refusal to allow adequate published tariff rates or other compensation" for Car Carriers and by "refusing to allow adequate temporary rate adjustments." Complaint ¶ 20(g).

In 1979, Ford prevented Car Carriers from acquiring the outstanding stock of Automobile Transport, Inc. ("ATI"), which was at that time Ford's carrier in Wayne, Michigan and other areas. This action by Ford "prevented a carrier consolidation which would have generated valuable back-haul business and resulted in significant operating efficiencies and cost reduction benefits" to ATI, Car Carriers, and Ford. Complaint ¶ 20(c). Later that year, Ford terminated ATI and awarded the substantial portion of ATI's business to Nu-Car and E&L on the basis of "sham and knowingly predatory bids." Complaint ¶ 20(e).

In 1981, Ford solicited bid proposals for Chicago haulaway services from Car Carriers and other Ford transporters. In October of that year, Ford terminated Car Carriers and awarded the haulaway contract for the Chicago area to Nu-Car on the basis of the latter's "sham and knowingly predatory bid." Complaint ¶ 20(h). To minimize the losses from the termination, Car Carriers attempted to sell its facilities and other assets to Nu-Car. However, the effort was frustrated when Ford and Nu-Car insisted on "walkaway and other onerous provisions . . . as well as unacceptable covenants and releases" of Car Carriers's claims against Ford, Nu-Car, and Associated Transport, Inc.; Nu-Car eventually constructed its own terminal facility near the Ford plant on land provided by Ford. Complaint ¶ 20(i).

B

In lieu of filing an answer, the defendants moved to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The district court, finding that the plaintiffs lacked "antitrust standing," granted the defendants' 12(b)(6) motion. Concluding that the "inherent internal flaws" in the antitrust claim were "non-curable," the court dismissed Count I with prejudice and the remaining counts without prejudice. 561 F. Supp. at 889 & n.12. The final judgment dismissing the entire action was entered on April 7, 1983.

On April 27, 1983, the plaintiffs filed a "Motion for Leave to File an Amended Complaint." The district court denied the motion as untimely under Rule 59(e) and as insufficient under Rule 60; a subsequent motion for reconsideration was denied. The plaintiffs then filed a notice of appeal from the initial order dismissing the complaint, the order denying leave to amend, and the order denying reconsideration.[3]

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[3] Jurisdiction in the district court could only be based on Count I. Due to the dismissal of that count, the court below was required to dismiss the remaining claims under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The appellants have not disputed this part of the decision and we, therefore, focus solely on the propriety of the dismissal of Count I.

We note that, on April 6, 1984, the plaintiffs filed in the district court a "Conditional Motion To Vacate Judgment Entered April 7, 1983 Pursuant to Fed. R. Civ. Pro. 60(b)(1) and (2)." This appeal was argued before this court on April 9, 1984. On May 31, 1984, the district court entered an order denying the April 6 motion. Apart from the transmission of the motion papers as a supplement to the record on appeal subsequent to oral argument before this court, this second Rule 60 motion was not raised as an issue and has not been briefed by the parties in this appeal. The district court's denial of the motion is, therefore, not before us. Even if we were to review that decision, however, we would be in full agreement with the lower court's conclusion that the April 6 motion was without merit.

II

A

1.

Before discussing Car Carriers's substantive claims, we must first consider the function of 12(b)(6) procedures in the context of antitrust litigation. We acknowledge the Supreme Court's statement in *Conley v. Gibson*, 355 U.S. 41 (1957), that a complaint should be dismissed for failure to state a claim only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46. Nonetheless, as this court has recognized, *Conley* has never been interpreted literally. *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984). In practice, "a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory." *Id.* at 654 (quoting *In re Plywood Antitrust Litig.*, 655 F.2d 627, 641 (5th Cir. 1981), *cert. dismissed*, ... U.S. ....., 103 S. Ct. 3100 (1983)).

We also note that the Supreme Court has stated that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962). However, we have previously concluded that, despite its sweeping language, *Poller* and its progeny simply stand for the proposition that, if a claim under the antitrust laws has been adequately set forth in the complaint, the highly factual and subjective questions of intent and purpose should be resolved after discovery and trial. *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 553 (7th Cir. 1980).

Thus, in the context of a 12(b)(6) challenge, the question is whether, if we accept all the allegations—including those relating to purpose and intent—as true, the plaintiffs have successfully pleaded a contract, combination, or conspiracy

in restraint of trade within the meaning of the Sherman Act. The pleader may not evade these requirements by merely alleging a bare legal conclusion; if the facts "do not at least outline or adumbrate" a violation of the Sherman Act, the plaintiffs "will get nowhere merely by dressing them up in the language of antitrust." *Sullivan, supra,* 727 F.2d at 654. When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint. A contrary view would be tantamount to providing antitrust litigation with an exemption from Rule 12(b)(6). *Havoco, supra,* 626 F.2d at 553. *Cf. Associated Gen. Contractors of Calif. v. California State Council of Carpenters,* ..... U.S. ....., 103 S. Ct. 897, 903 n.17 (1983) (suggestion that "district court must retain power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed").

2.

In view of the district court's disposition, we must also discuss the scope of the record on a motion to dismiss for failure to state a claim. In its ruling, the court below "flesh[ed] out" the complaint by relying on the expanded statements in the plaintiffs' memoranda. 561 F. Supp. at 886 n.2. However, it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss. *Jacobson v. Peat, Marwick, Mitchell & Co.,* 445 F. Supp. 518, 526 (S.D.N.Y. 1977); *Sansom Comm. v. Lynn,* 366 F. Supp. 1271, 1278 (E.D. Pa. 1973); *Chambliss v. Coca-Cola Bottling Corp.,* 274 F. Supp. 401, 409 (E.D. Tenn. 1967), *aff'd on other grounds,* 414 F.2d 256 (6th Cir. 1969), *cert. denied,* 397 U.S. 916 (1970). Similarly, consideration of a motion to dismiss is limited to the pleadings. *Hill v. Trustees of Ind. Univ.,* 537 F.2d 248, 251 (7th Cir. 1976); *accord Martin v. Morgan Drive Away, Inc.,* 665 F.2d 598, 602 n.1 (5th Cir.), *cert. dis-*

missed, 458 U.S. 1122 (1982). Thus, it may have been questionable for the district court to have relied on the plaintiffs' briefs to embellish the conclusory allegations of the complaint. This action was in no way prejudicial to the plaintiffs, however, as the lower court was using the briefs to examine and consider every reasonable presumption in the plaintiffs' favor. Nonetheless, in this appeal we limit our review, as we must, to the well-pleaded allegations of the complaint.

B

1.

We now consider the substantive allegations that must be present in order for this complaint to state a claim under § 1. The fundamental requirement at issue in this dispute is that of a sufficient allegation of anticompetitive effects that would result or have resulted from the defendants' actions; the absence of such allegations is ordinarily fatal to the existence of a cause of action.[4] *Havoco, supra*, 626 F.2d at 554. The purpose of the Sherman Act is to rectify the injury to consumers caused by diminished competition; it is for this reason that Congress provided a

[4] We initially note that the allegations of the concerted action required to state a claim under § 1 of the Sherman Act are dangerously weak. Unilateral action, of course, is not a violation of § 1. *Monsanto Co. v. Spray-Rite Serv. Corp.*, ... U.S. ....., 104 S. Ct. 1464, 1469 (1984). Standing alone, the boilerplate recitation of a conspiracy in ¶ 19 of the complaint is insufficient to withstand a motion to dismiss. *Havoco, supra*. The remainder of Count I appears to allege only unilateral action by either Ford or Nu-Car. In addition, it is inherently implausible that Ford, which is alleged to have total control over its carriers, would conspire with Nu-Car to eliminate Car Carriers so that Nu-Car could later charge Ford non-competitive prices. Similarly, it is implausible that other carriers would band together to eliminate the plaintiffs when, given the exclusive nature of the contract with Ford, only one of these competitors could prevail. However, mindful of the Supreme Court's admonition in *Poller, supra*, we do not base our decision on a finding that the allegations of concerted action were deficient.

treble damage recovery for private parties willing to initiate an enforcement action. *Id.* at 555. Thus, the plaintiff must allege, not only an injury to himself, but an injury to the market as well. As we stated in *Sutliff, supra,* 727 F.2d at 655:

> The legislators who passed the Sherman Act did not make ordinary business torts federal torts for which treble damages could be recovered; no such wholesale displacement of state tort law into the federal courts was contemplated or desired . . . . Their concern, at least as it has been understood in recent cases, was with practices that by making the market less competitive hurt the people buying from or selling to the firms in those markets.

See also Hunt v. Crumboch, 325 U.S. 821, 826 (1945) (Sherman Act "does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce"); *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Assoc., Inc.,* 672 F.2d 1280, 1288 (7th Cir. 1982); *Contractor Util. Sales Co. v. Certain-Teed Prods. Corp.,* 638 F.2d 1061, 1078 n.21 (7th Cir. 1981) ("The losers [in the marketplace] must prove more than just their loss in order to secure relief under the antitrust laws."); *Havoco, supra,* 626 F.2d at 558-59.

It is only when the plaintiff adequately states a *per se* violation of § 1 of the Sherman Act that an allegation of anticompetitive effects is not required. *Havoco, supra,* 626 F.2d at 555. It is not that such effects need not exist in order to establish the elements of such a violation, but rather that conduct constituting a *per se* violation is viewed by the law as so inimical to free competition that the pernicious effects are conclusively presumed; stated in another manner, *per se* violations of the antitrust laws are anticompetitive by definition. Examples of such offenses include price-fixing schemes, as well as certain types of group boycotts, market allocations, and tying arrangements. *Id.* We also note that the Supreme Court

has in its most recent decisions cautioned against the precipitate application of the *per se* doctrine. As the Court stated in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20 (1979), a practice could only be considered a *per se* violation if its effect and purpose was "to threaten the proper operation of our predominantly free-market economy," that is, if the practice "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *See also Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Thus, the *per se* label must be applied with caution and we will expand that class of violations "only after the courts have had considerable experience with the type of conduct challenged and application of the Rule of Reason has inevitably resulted in a finding of anticompetitive effects." *Havoco, supra*, 626 F.2d at 555.

Although their argument is less than clear, the plaintiffs apparently maintain that the activities alleged in the complaint constitute a *per se* violation. In support of their argument, the plaintiffs have referred us to decisions condemning vertical and horizontal agreements for resale price maintenance, as well as concerted refusals to deal. Of course, the plaintiffs' attachment of the *per se* label is simply inadequate in itself to sustain the complaint; the defendants' alleged activity must be scrutinized to determine whether such a characterization is appropriate. *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1284 (7th Cir. 1983). After considering the allegations, we find that the lines of authority relied upon by the plaintiffs are simply inapposite and that no *per se* violation has been alleged.

First, only those vertical arrangements that accompany or implement a price-fixing scheme are considered *per se* violations; other vertical arrangements must be tested under the Rule of Reason. *Monsanto Co. v. Spray-Rite Serv. Corp.*, ... U.S. ....., 104 S. Ct. 1464, 1469 (1984); *Continental T.V., supra*. The plaintiffs have not alleged a price-fixing scheme, and price-cutting by Car Carriers was in no way a factor in its dispute with Ford. *Cf. Dunn*

& Mavis, Inc. v. Nu-Car Driveaway, Inc., 691 F.2d 241, 245 (6th Cir. 1982). In fact, the clear inference is that Car Carriers continually sought to raise its prices. In addition, the market structure described in the complaint is not analogous to a hierarchy of manufacturer, distributors, and resellers. Ford is simply a purchaser of hauling services and the plaintiffs are sellers of those services.

The invocation of decisions finding *per se* violations in concerted refusals to deal is also unavailing. It is well settled in this circuit that "group boycotts" are considered a *per se* violation only if they are used to enforce agreements that are themselves illegal *per se*. *See Vogel v. American Soc'y of Appraisers*, No. 83-3218, slip op. at 3 (7th Cir. Sept. 20, 1984); *Products Liab. Ins. Agency, Inc. v. Crum & Foster Ins. Cos.*, 682 F.2d 660, 663 (7th Cir. 1982); *United States Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781, 787-90 (7th Cir. 1981) (*en banc*); *Contractor Util., supra*, 638 F.2d at 1072 n.9. The complaint fails to suggest in any way that the object of the alleged conspiracy constituted a price-fixing scheme, a tying arrangement, or a market allocation. To the contrary, the complaint simply states that Ford elected to replace its exclusive haulaway transporter for the Chicago area with another carrier on the grounds that the original carrier continually sought higher prices that Ford was unwilling to pay. Ford obviously entered into an "agreement" with Nu-Car that resulted in the elimination of Car Carriers, but the same could be said of any similar exclusive arrangement when the original supplier of services is replaced by another.

The allegations relating to Car Carriers' attempt to sell its assets after its termination by Ford are also insufficient. The plaintiffs allege only that the parties could not come to an agreement on the terms for the sale. It would indeed be inappropriate, especially in view of the admonitions of the Supreme Court discussed above, to find that the insistence of Ford and Nu-Car on "walkaway and other onerous provisions . . . as well as unacceptable

covenants and releases" called for the application of the *per se* rule. *Cf. Dunn & Mavis, supra,* 691 F.2d at 243.[5]

2.

Having determined that the activities alleged in the complaint do not rise to the level of a *per se* violation, we must next consider the question whether the allegations state a claim under the Rule of Reason. *Havoco,* 626 F.2d at 556. The fatal flaw in these pleadings is the absence of any allegation, either direct or inferential, of an anticompetitive effect. In this regard, it is important to note that the egregiousness of the defendants' behavior does not, by itself, constitute a violation of § 1. Tortious activities in the form, for example, of unfair competition do not contravene the antitrust laws unless accompanied by the requisite anticompetitive effect. Losing business to a competitor is an inevitable consequence of the economic system that the Sherman Act was designed to protect; some enterprises will prevail and others will not, but it is the function of § 1 to compensate the unfortunate only when their demise is accompanied by a generalized injury to the market. *Havoco, supra*; *Dunn, supra.* As the Supreme Court has aptly stated, the antitrust laws were designed to protect competition, not merely competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

As noted above, it is inherently implausible that Ford, as a buyer that could "dictate[ ] and control[ ]" the tariffs of its suppliers of transportation services, would conspire in order to allow its new carrier, Nu-Car, to charge non-

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[5] The plaintiffs' bald reference to "sham" and "predatory" bids states no more than a legal conclusion and the complaint provides no explanation of these terms. As noted above, such allegations are legally insufficient. Moreover, it would be improper for us to attempt to conjure up some sort of tenable antitrust scheme for these cryptic allusions. Needless to say, they cannot serve as a foundation for a *per se* violation of § 1.

competitive prices; the plaintiffs are alleging, in essence, that Ford conspired to injure itself. Similarly, given the exclusive nature of the services Car Carriers provided to Ford, it is implausible that other carriers would band together in order to eliminate Car Carriers, if only one member of the "conspiracy" could prevail.

Even if we look beyond this, however, the complaint does not in any way set forth facts to support the conclusion that this putative conspiracy had any anticompetitive effect. Specifically, there are no allegations that, having terminated Car Carriers in favor of Nu-Car, Ford was compelled, or would be compelled, to pay prices that were not the result of the competitive process. There are also no allegations that the quality or quantity of the haul-away services in the Chicago area deteriorated. Quite to the contrary, the clear implication is that Car Carriers was terminated because it continually sought higher tariffs that Ford was unwilling to pay and that Ford was dissatisfied with the quality and quantity of Car Carriers's services. Having attempted to work with Car Carriers to rectify the problem, Ford then solicited bids for the services and Nu-Car simply provided a lower price. Stated differently, the injury that Car Carriers has alleged appears to be the result of procompetitive activity.

The confusing allegation of a "sham and knowingly predatory" bid from Nu-Car does not alter our conclusion. As noted above, invocation of antitrust terms of art does not confer immunity from a motion to dismiss; to the contrary, these conclusory statements must be accompanied by supporting factual allegations. The plaintiffs' statements provide no more than a legal conclusion. Even if we ignore this lacuna, however, the facts actually alleged render unlikely any "predatory" bidding by Nu-Car. First, if this was in fact a unilateral act by Nu-Car, it does not state a claim under § 1, because the requirement of concerted activity has not been satisfied. *Monsanto, supra.* If we assume that there actually was concerted activity between Ford and Nu-Car, the "predatory" bid becomes utterly implausible. In considering a motion to

dismiss, the court is not required to don blinders and to ignore commercial reality. *Havoco, supra.* If Ford absolutely controls the rates charged by its suppliers, it is preposterous to assume that Ford would conspire with Nu-Car to eliminate Car Carriers by accepting Nu-Car's "predatory" bid so that the latter could later charge noncompetitive, monopoly prices. The complaint characterizes Ford as a buyer that was highly concerned about the prices it paid; it would be unusual indeed for Ford now to conspire with Nu-Car to accept a "predatory" bid with Ford to become the victim. It would be contrary to the principles set forth above to find that, in view of the other deficiencies of this complaint, the unadorned and conclusory allegation of a "predatory" bid would allow this pleading to withstand a motion to dismiss.

The complaint does not amplify the statement that the bid was a "sham." As noted above, if this was a unilateral act by Nu-Car, no claim under § 1 has been alleged. If Ford and Nu-Car improperly manipulated the bidding process, then Car Carriers may have a claim grounded in tort or contract; the absence of any allegation of an anticompetitive effect prevents these claims from coming within the purview of the antitrust laws.

We find that the Sixth Circuit's characterization in *Dunn & Mavis, supra,* aptly applies to the case before us: "When stripped to its essential allegations, the complaint does no more than state plaintiffs' commercial disappointment at losing [Ford's] patronage." 691 F.2d at 243. A finding that these allegations stated a claim under § 1 of the Sherman Act would severely limit "a buyer's right to displace an old seller in favor of a new one" and "would undermine the principles of competition the antitrust laws were designed to secure." *Id.* at 244. We also note this court's observation in *Havoco, supra,* that it is "hard to ignore the suspicion that the facts have been forced into an antitrust mold to achieve federal jurisdiction." 626 F.2d at 559.

In conclusion, the dismissal of the original complaint was correct and will be affirmed.

III

A

Having determined that the original complaint failed to state a claim upon which relief could be granted, we now consider the plaintiffs' argument that the district court, after dismissing the entire action, erred in refusing to grant the plaintiffs leave to amend their original complaint. The plaintiffs maintain that, under Rule 15(a) of the Federal Rules of Civil Procedure, they have an absolute right to amend as a matter of course if the defendants have not filed a responsive pleading. We disagree.

Rule 15(a) provides in relevant part that:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The plaintiffs, relying on the literal language of the Rule, assert that only the filing of a responsive pleading extinguishes the right to amend as a matter of course. Although the language of Rule 15(a) taken in isolation is susceptible to the reading that the right to amend once as a matter of course survives a dismissal of the action, this court has not so construed the Rule. The plaintiffs' reading of the decisions of this circuit is inaccurate and their argument represents a misunderstanding of the fundamental distinction between the dismissal of the action in its entirety and the dismissal of the complaint.

It is well settled in this circuit that a motion to dismiss is not a "responsive pleading" within the meaning of Rule 15(a). *See Northlake Community Hosp. v. United States*, 654 F.2d 1234, 1240 (7th Cir. 1981); *Fuhrer v. Fuhrer*, 292 F.2d 140, 142 (7th Cir. 1961). Similarly, the dismissal of the complaint is not a final appealable order. *United States ex rel. Kelly v. Bibb*, 255 F.2d 772, 773-74 (7th Cir. 1958). When the original complaint alone is dismissed, the litigation has not been terminated and the plaintiff still retains

his right to amend once as a matter of course under Rule 15(a). *Peterson Steels, Inc. v. Seidman*, 188 F.2d 193 (7th Cir. 1951).

That right does not, however, survive a dismissal of the entire action. *See Northlake, supra*, 654 F.2d at 1240 (plaintiff "was entitled to amend its complaint 'as a matter of course' any time prior to the dismissal of the action"); *Swam v. United States*, 327 F.2d 431 (7th Cir. 1964), *cert. denied*, 379 U.S. 852 (1964). Once the district court has dismissed the suit, two courses of action are open to the plaintiff: (1) he may appeal the judgment or (2) he may seek leave to amend under Rule 15(a) after having the judgment reopened under either Rule 59 or 60. *Swam, supra*, 327 F.2d at 433. *See also* 3 Moore's Federal Practice ¶ 15.10 at 15-144 to 45 (2d ed. 1984) ("The better view is that after a judgment of dismissal plaintiff must move under Rules 59(e) or 60(b) to reopen the judgment."); 6 Wright & Miller, Federal Practice and Procedure § 1489 at 445 (1971) ("Most courts . . . have held that once the judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60."). This represents a compromise between the liberal amendment policy of the Federal Rules and the general judicial policy relating to quiescence and the finality of judgments.

The three decisions of this court upon which the plaintiffs rely simply stand for the proposition that the plaintiff may amend without first seeking leave of the district court at any time after the original *complaint* has been dismissed. *See Jafree v. Barber*, 689 F.2d 640 (7th Cir. 1982); *Fuhrer v. Fuhrer*, 292 F.2d 140 (7th Cir. 1961); *Peterson, supra*. The primogenitor in the line of decisions to which the plaintiffs refer is, of course, *Peterson, supra*. In that case, after the district court had dismissed the complaint, the plaintiff filed a motion for leave to amend; the court denied the motion and terminated the litigation. This court held that the denial was reversible error, as the plaintiff had a right to amend under 15(a) as a matter of course after the initial dismissal of the complaint. However, neither this decision nor the others cited by the

plaintiffs stand for the proposition that this right to amend as a matter of course survives a dismissal of the entire *action*, for in those cases only the original complaint had been dismissed when the respective plaintiffs sought to amend.

B

We now turn to the facts of this case. Because the district court dismissed the action, rather than simply the complaint, the plaintiffs' right to amend as a matter of course under Rule 15(a) was extinguished. They therefore had to seek leave to amend after reopening the judgment by way of either a Rule 59(e) or Rule 60(b) motion. Thus, the district court was correct in characterizing the April 27 motion as such an attempt.

A Rule 59(e) motion must be made "not later than 10 days after entry of the judgment" and no extension of time is permitted. Fed. R. Civ. P. 6(b), 59(e). Because the motion was made more than ten days after the judgment dismissing the action, it was untimely. With reference to the Rule 60 portion of the motion, we agree with the court below that the reasons proffered by the plaintiffs, i.e., that they sought to expand the allegations in the original complaint, did not fall within the six categories listed in the Rule and were, therefore, insufficient. In their appeal, the plaintiffs have offered no serious argument to the contrary. Thus, as in *Swam, supra*, the motion for leave to amend was a "nullity," 327 F.2d at 434, and the decision of the district court to deny leave to amend was correct.

The judgment is in all respects AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Milton I. Shadur
Cause No. 82 C 7009 Date April 1, 1983
Title of Cause
Car Carriers Inc. -v- Ford Motor Co. et al

MEMORANDUM OPINION AND ORDER

Memorandum opinion & order entered. Accordingly, defendants' motions to dismiss are granted. This entire action is dismissed—Count I with prejudice & the other Counts without prejudice.

(Draft)

/s/ Milton I. Shadur

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 C 7009

CAR CARRIERS, INC., *et al.*,

Plaintiffs,

vs.

FORD MOTOR COMPANY and
NU-CAR CARRIERS, INC.,

Defendants.

MEMORANDUM OPINION AND ORDER

Car Carriers, Inc. ("Car Carriers"), its affiliate Clark Transport Company, Inc. ("Clark"), their controlling shareholder James P. Byrne, and four other related entities[1] bring a six-count Complaint against Ford Motor Company ("Ford") and Nu-Car Carriers, Inc. ("Nu-Car"). Count I charges a conspiracy in violation of Sherman Act §1 ("Section 1"), 15 U.S.C. §1. All other counts assert pendent state law claims. Both Ford and Nu-Car have moved to dismiss (1) Count I for failure to state a cognizable anti-

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[1] Other plaintiffs comprise JPB Corporation ("JPB"), Carrier Equipment Company ("Carrier Equipment"), Transco Corporation ("Transco"), and Tykely Investment Company ("Tykely"). Byrne is the principal shareholder in JPB, which is in turn the parent of Car Carriers, Clark, Carrier Equipment and Transco. Tykely is a limited partnership between Byrne and members of his family.

trust claim and (2) Counts II-VI for lack of pendent jurisdiction. For the reasons stated in this memorandum opinion and order, their motions are granted.

Allegations of the Complaint[2]

From 1968 until late October 1981 Car Carriers and Clark hauled all new Ford automobiles from Ford's assembly plants and railheads in Chicago. Though Clark may have provided haulaway transportation for other automobile producers as well, Car Carriers served only Ford. As to their Chicago traffic[3] both carriers operated under carrier authority issued by both the Interstate and Illinois Commerce Commissions. Their rates were therefore subject to the approval of those governmental bodies. Ford also "dictated and controlled" the tariff by threatening either to oppose any disfavored rate applications or to take punitive action, such as termination. Complaint ¶19(d).

Some time during the mid-1970s Ford and some of its other carriers, including Nu-Car, E & L Transport Company ("E & L Transport "), Motor Convoy, Inc. ("Motor Convoy"), Auto Convoy Co. ("Auto Convoy") and Associated Transport, Inc. ("Associated"),[4] embarked on a campaign to terminate Car Carriers, Clark and some other

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[2] This account fleshes out the Complaint somewhat by drawing on the expanded statements in plaintiffs' memorandum (though defendants rightly criticize plaintiffs for going beyond the Complaint on a Rule 12(b)(6) motion, this Court has indulged plaintiffs in that respect to demonstrate they confront more than mere pleading deficiencies).

[3] Clark also hauled cars from Ford's facility and railheads in Wayne, Michigan.

[4] Nu-Car is the only co-conspirator carrier sued in this action.

carriers then serving Ford[5] and to force them to sell their businesses at cut-rate prices. That predatory scheme had five operative elements:

> 1. Ford induced each target carrier to invest heavily in new tractor-trailer rigs, real estate and new terminal facilities "with the promise of additional transportation traffic and complete agreement with increased tariff rates necessary to pay for" those acquisitions. Complaint ¶¶ 19(b) and (c).
>
> 2. Ford then precluded those carriers from obtaining rate increases sufficient to operate their expanded businesses profitably. Complaint ¶¶ 19(d) and (e).
>
> 3. With the cooperation of the non-target carriers, Ford "[i]nterfered with and prevented target haulaway carriers and their affiliates from selling their businesses and assets as going business concerns or prevented target haulaway carriers from consolidation or merger with other carriers." Complaint ¶19(h).
>
> 4. Ford then terminated its relationship with the disfavored carriers, assigning their traffic to the co-conspirator carriers.
>
> 5. At that point the favored carriers were in the position of acquiring the assets of the target carriers at distress prices. Complaint ¶19(i).

Though Car Carriers' demise generally tracked this scenario, some elaboration of its victimization is instructive. At the inception of the conspiracy in 1975, Ford directed Byrne to sell Car Carriers to someone who would not seek tariff rates as high as those sought by Car Car-

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[5] In addition to plaintiffs, target carriers include Automobile Transport, Inc. ("ATI") and Dealers Transport.

riers. Byrne then attempted to sell Car Carriers to co-conspirator E & L Transport. After they had executed a letter of intent, Ford induced E & L Transport to renege on the deal by threatening to withhold Car Carriers' Chicago traffic from E & L Transport.

In 1977 and 1978 Ford ordered Car Carriers to purchase 80 new tractor-trailer rigs for $6 million, promising sufficient rate hikes to recover that investment. Though Car Carriers acceded to the demand, Ford thereupon stymied Car Carriers' efforts to obtain regulatory approval for the tariff increases.

In late 1979 Car Carriers attempted to bolster its financial posture by acquiring ATI, another target carrier. Ford not only blocked that consolidation initiative but also terminated ATI. Initially Ford divided ATI's business among Nu-Car, E & L Transport, Car Carriers and Clark. But within three months Ford transferred Car Carriers' share to E & L Transport.

In the summer of 1981 Ford solicited bid proposals from Car Carriers and other Ford Carriers for its Chicago haulaway business, all of which had been allocated to either Car Carriers or Clark. Ford awarded the business to Nu-Car "on the basis of a sham and knowingly predatory bid." Complaint ¶20(h).

Needless to say, plaintiffs' haulaway operations were then in shambles. Cut off from Ford, plaintiffs were unable to use their newly-purchased tractors and rigs and their terminal facility adjacent to Ford's Chicago plant. To minimize their staggering losses, plaintiffs attempted to sell the facility and other assets to Nu-Car at submarket prices. Negotiations were scuttled when Nu-Car at Ford's behest "insisted on 'walkaway' and other onerous provisions . . . as well as unacceptable covenants

and releases of claims of plaintiffs against Nu-Car, Ford and Associated Transport." Complaint ¶20(i). Instead, Nu-Car built its own terminal facility next to Ford's plant on land supplied by Ford.

Count I

Count I really asserts a conspiracy encompassing two distinct conspiracies:

> 1. to exclude target carriers from the "market" for haulaway transportation of Ford cars and
>
> 2. to refuse to purchase, except at distress prices, the assets of the target carriers upon their termination.

However, neither of those aspects of the alleged overall conspiracy passes Rule 12(b)(6) muster.

More than one road leads to that destination. But the shortest one, the one that requires least discussion, is plaintiffs' lack of "antitrust standing" to recover treble damages under Clayton Act §4, 15 U.S.C. §15. And such standing is a threshold requirement that must be met, regardless of whether the substantive antitrust claim is grounded on a per se or rule of reason theory.

"Antitrust standing" concepts require a plaintiff to suffer the type of harm the antitrust laws were designed to recompense: "treble-damages recoveries should be linked to the pro-competition policy of the antitrust laws." *Blue Shield of Virginia v. McCready*, 102 S.Ct. 1540, 2550 (1982). *Accord, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1979) (emphasis in original):

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes de-

> fendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Here the Complaint's allegations, coupled with plaintiffs' concessions in their responsive memorandum, foreclose *any* possibility of anticompetitive harm from either component of the putative conspiracy.

1. *Conspiracy To Terminate Plaintiffs*

Plaintiffs have really conceded the supposed conspiracy to squeeze them out was motivated solely by Ford's desire to replace high-priced suppliers (plaintiffs) with a low-priced one (Nu-Car):

> 1. Complaint ¶¶ 19(d) and (e) acknowledge Ford's resistance to the increased tariff rates proposed by plaintiffs.
>
> 2. Complaint ¶20(h) admits Ford diverted its Chicago traffic from plaintiffs to Nu-Car on the basis of the latter's lower (and allegedly "predatory"[6]) bid.
>
> 3. In embellishing on the assertion of Complaint ¶20(a) that Ford had ordered Byrne to sell Car Carriers, plaintiffs' Mem. 5 ascribes a procompetitive motive to Ford: Ford desired the sale of "Car Carriers to someone 'more suitable' . . ., because Car

[6] Though this Court has accepted the "predatory" characterization arguendo, it is constrained to point out that label in antitrust idiom denotes more than just a lower bid. As the text hereafter indicates, all plaintiffs' other allegations, which portray Ford as the dominant figure able to control the prices it pays for haulaway services, belie the notion Nu-Car's lower-priced proposal was more than a competitive effort to capture new business. Plaintiffs may prefer to call that a "predatory" effort by Nu-Car, but it simply does not qualify for that term-of-art antitrust definition.

> Carriers had requested Ford approval of what Ford considered unduly high tariff rates."

All this is of course a prototype of procompetitive rather than anticompetitive activity.

Indeed the conspiracy's procompetitive potential is a *necessary* consequence of the very structure of the allegedly restrained haulaway "market." According to the Complaint Ford not only is the sole consumer in the relevant "market" but also has sufficient economic power to dictate the terms (both price and quantity) of its dealings with all its carriers—targets and co-conspirators alike.[7] What plaintiffs really depict is Ford (the moving force in the conspiracy) acting in its own economic interest and terminating plaintiffs in order to lower its own transportation costs—a procompetitive benefit capable of being passed on via lower prices to the ultimate purchasers of Ford cars (the market in which Ford competes with all other car manufacturers). Accordingly plaintiffs' own assertions demonstrate conclusively their termination is not of the type of anticompetitive injury the antitrust laws were intended to forestall.[8]

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[7] Plaintiffs' Mem. 4 concedes that Ford "effectively controlled the tariffs of its carriers" and that any carrier's attempt to evade such dominance "was dealt with severely by Ford, via termination or otherwise." See also Complaint ¶¶ 19(d) and (f) (Ford "dictated and controlled" such tariff rates so as to destroy the target carriers and bolster the non-target ones). Having unfettered control over the allocation of its traffic among those carriers with the requisite operating authority, Ford also determined the "quantity" of haulaway services provided by those carriers.

[8] Even assuming the conspiracy to terminate plaintiffs could be labeled a "group boycott" (a concept ill-suited to the market structure portrayed in this case), the per se rule against such arrangements does not require this Court to presume the anticompetitive nature of plaintiffs' termination when they themselves

(Footnote continued on following page)

2. *Conspiracy To Boycott Plaintiffs' Assets*

Count I's other alleged conspiracy—a collective refusal to purchase plaintiffs' assets except at distress prices—must also be dismissed for lack of "antitrust standing." Plaintiffs' asserted injury unquestionably flowed from the procompetitive aspects of the claimed boycott.[9] By allegedly precluding plaintiffs from selling their business to *existing* Ford carriers, this joint refusal to deal preserved plaintiffs as a potential rival (or forced them to sell to a new entrant) and thereby intensified competitive pressures in the relevant market.

Indeed in the relevant antitrust sense of examining the effect on *competition* and not on *competitors* (plaintiffs),[10]

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[8] *continued*
have professed just the opposite. This is not the situation posed by a Complaint merely *silent* on that score. *See Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959) (allegation of group boycott states an antitrust claim even if unaccompanied by any assertion of anticompetitive purpose or effect). On the "group boycott" subject itself, the alleged agreement among suppliers of services (haulaway drivers) and the purchaser of those services (Ford—the alleged "market") differs substantially in market analysis terms from the usual alleged "group boycott" agreement among a manufacturer and parties (distributors or retailers) down the chain of distribution toward the ultimate consumer market. That issue did not have to be reached in the recent *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241 (6th Cir. 1982) (upholding dismissal of a complaint alleging a conspiracy much like that claimed here, except that only *one* competing haulaway supplier was involved with the auto manufacturer).

[9] As the text analysis indicates, the pejorative "group boycott" label fits no better here than it did at n.8, albeit for a different reason.

[10] *See Brunswick*, 429 U.S. at 488:

> The antitrust laws, however, were enacted for "the protection of *competition*, not *competitors*," *Brown Shoe Co. v. United States*, 370 U.S., at 320.

a purchaser from plaintiffs at distress prices would (because of its own lower costs) be better able to compete with the remaining haulaway carriers for Ford's business.[11] *Cf. Havoco,* 626 F.2d at 558-59 (victim of alleged conspiracy remained a market force as a potential competitor).

* * *

Thus neither conspiracy alleged in Count I states an antitrust claim that can survive defendants' motion to dismiss. Accordingly the entire count must be dismissed.

Counts II-VI

This Court has jurisdiction over plaintiffs' state law counts only under the concept of pendent jurisdiction, for complete diversity between the parties is lacking. Because Count I has been dismissed, the remaining counts are no longer pendent to any federal claim and must fall as well. *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966).

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[11] It should of course be emphasized that this entire analysis looks solely at the antitrust implications of the activities described in the Complaint. No holding is made or intended as to plaintiffs' possible recovery or non-recovery on a variety of common-law tort theories. Even on the assumption plaintiffs are right in that latter respect, the situation would then be as described by our Court of Appeals in *Havoco of America, Ltd. v. Shell Oil Co.,* 626 F.2d 549, 559 (7th Cir. 1980):

> Havoco's complaint details a scenario of unsavory and reprehensible business practices, all of which are actionable in a state forum. We note our agreement with the district court's observation that "[i]t is hard to ignore the suspicion that the facts have been forced into an antitrust mold to achieve federal jurisdiction."

Conclusion

Ford's and Nu-Car's motions to dismiss are granted. Because Count I could not possibly be repleaded to withstand Rule 12(b)(6) onslaught,[12] this entire action is dismissed—Count I with prejudice and the other counts without prejudice.

/s/ Milton I. Shadur
Milton I. Shadur
United States District Judge

Date: April 1, 1983

[12] As already indicated at n.2, this opinion has treated plaintiffs' assertions in the way most favorable to them. Their inherent internal flaws (in the antitrust sense) are non-curable.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

October 30, 1984.

Before

Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. WILLIAM J. JAMESON, *Senior District Judge**

CAR CARRIERS, INC., *et al.*,

Plaintiffs-Appellants,

No. 83-1825 vs.

FORD MOTOR COMPANY and
NU-CAR CARRIERS, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 82 C 7009—**Milton I. Shadur**, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable William J. Jameson, Senior District Judge for the District of Montana, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CAR CARRIERS, INC., CLARK TRANSPORT COMPANY, INC., CARRIER EQUIPMENT CO., TRANSCO CORPORATION, JPB CORPORATION, JAMES P. BYRNE, and TYKELY INVESTMENT CO.,

Plaintiffs,

v.

FORD MOTOR COMPANY and
NU-CAR CARRIERS, INC.,

Defendants.

Civil Action No. 82 C 7009
PLAINTIFFS DEMAND TRIAL BY JURY

COMPLAINT

Plaintiffs CAR CARRIERS, INC., CLARK TRANSPORT COMPANY, INC., CARRIER EQUIPMENT CO., TRANSCO CORPORATION, JPB CORPORATION, JAMES P. BYRNE, and TYKELY INVESTMENT CO., by their attorneys state the following for their complaint against defendants FORD MOTOR COMPANY and NU-CAR CARRIERS, INC.

Count I

Jurisdiction and Venue

1. Count I is brought to recover damages caused by defendants' violations of Section 1 of the Sherman Act,

15 U.S.C. §1 and for injunctive relief against continuation of such violations, as provided by Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26.

2. Defendants transact business and are found within the Northern District of Illinois, Eastern Division. Venue is pursuant to the provisions of 15 U.S.C. §22 and 28 U.S.C. §1391(b).

Plaintiffs

3. Plaintiff CAR CARRIERS, INC. ("Car Carriers"), a successor to Dealers Transit, Inc. as of July 22, 1968, is a Delaware corporation having its principal place of business in Chicago, Illinois. At all material times, Car Carriers was engaged primarily in the business of haulaway truck transportation of new automobiles. Prior to October, 1981, Car Carriers provided haulaway transportation solely for Ford Motor Company. The overwhelming majority of Car Carriers' business emanated from Ford's Chicago assembly plant and railheads in Chicago.

4. Plaintiff CLARK TRANSPORT COMPANY, INC. ("Clark") is a Delaware corporation having its principal place of business in Chicago, Illinois. At all material times, Clark was engaged in the business of haulaway transportation of new automobiles. Prior to October, 1981, Clark provided haulaway transportation for new Ford automobiles from Ford's assembly plants and railheads in Chicago, Illinois and Wayne, Michigan.

5. Plaintiff CARRIER EQUIPMENT CO. ("Carrier Equipment") is a Delaware corporation having its principal place of business in Chicago, Illinois. Carrier Equipment is engaged in the labor service business and provided personnel to Car Carriers for use in certain of its operations.

6. Plaintiff TRANSCO CORP. ("Transco") is a Washington corporation headquartered in the state of Washington. Transco is the owner of numerous pieces of tractor-trailer equipment which were purchased for lease to Car Carriers.

7. Car Carriers, Clark, Carrier Equipment and Transco are subsidiaries and divisions of a single, overall business enterprise of plaintiff JPB CORPORATION ("JPB"), a Delaware corporation having its principal place of business in Chicago, Illinois and which directly or indirectly owns 80% or more of the outstanding stock of each of the other four plaintiff corporations.

8. Plaintiff JAMES P. BYRNE ("Byrne"), a natural person, is a citizen of the State of Illinois. At all material times, Byrne was the owner of 70% or more of the outstanding stock of JPB and was its principal executive and operating officer.

9. Plaintiff TYKELY INVESTMENT CO., ("Tykely") is a limited partnership between Byrne and members of his family, all of whom are citizens of the State of Illinois. Tykely is the owner of certain real property with improvements thereon located in the state of Illinois proximate to Ford's Chicago assembly plant and used as a terminal for the transportation by truck and by rail of newly manufactured Ford automobiles.

Defendants and Co-Conspirators

10. Defendant FORD MOTOR COMPANY ("Ford") is a Delaware corporation having its principal place of business in Dearborn, Michigan. Ford is one of the largest industrial corporations in the United States and, at all material times, has been engaged in the business, among others, of manufacturing automobiles. Ford maintains of-

fices and a manufacturing facility on South Torrence Avenue in Chicago, Illinois.

11. Defendant NU-CAR CARRIERS, INC. ("Nu-Car") is a Massachusetts corporation having its principal place of business in Bryn Mawr, Pennsylvania. At all material times, Nu-Car has been engaged in the business of haulaway transportation of new Ford automobiles. Nu-Car maintains offices and a transport facility in Chicago, Illinois. Since October, 1981, Nu-Car has provided haulaway transportation for new Ford automobiles from Ford's Chicago assembly plant and railheads in Chicago.

12. Co-conspirator ASSOCIATED TRANSPORT, INC. ("Associated") is a Missouri corporation having its principal place of business in Hazelwood, Missouri. At all material times, Associated has been engaged in the business of haulaway transportation of new Ford automobiles.

13. Co-conspirator E & L TRANSPORT COMPANY ("E&L") is a Michigan corporation having its principal place of business in Dearborn, Michigan. At all material times, E&L has been engaged in the business of haulaway transportation of new Ford automobiles.

14. Co-conspirator THE MOTOR CONVOY, INC. ("Motor Convoy") is a Georgia corporation having its principal place of business in Atlanta, Georgia. At all material times, Motor Convoy has been engaged in the business of haulaway transportation of new Ford automobiles.

15. Co-conspirator AUTO CONVOY CO. ("Auto Convoy") is a Texas Limited Partnership headquartered in Dallas, Texas. At all material times herein, Auto Convoy has been engaged in the business of haulaway transportation of new Ford automobiles.

16. Others presently unknown have participated as co-conspirators in the combination and conspiracy alleged.

Nature of Trade and Commerce

17. Ford's automotive sales in 1981 amounted to approximately thirty-four billion six hundred seventy three million dollars ($34,673,000,000).

18. New Ford automobiles are shipped in interstate commerce by means of both rail and haulaway transport carriers from railheads and assembly plants to various dealer locations throughout the United States. Plaintiffs, prior to October, 1981 and defendant Nu-Car, since October, 1981, have been engaged in both intrastate and interstate haulaway transportation of new Ford automobiles from Ford assembly plants and railheads in Chicago and in Wayne, Michigan to various dealer locations.

Violations Alleged

19. Commencing on a date unknown, but at least as early as 1975, defendants and their co-conspirators, entered into contracts and engaged in a continuing combinations and conspiracies to restrain trade in the business of providing haulaway motor transportation for new Ford automobiles and to injure or destroy the business of plaintiffs and certain other similarly situated Ford carriers, the substantial terms of which are the following:

a) Targeted certain haulaway carriers (hereafter "target carriers"), including plaintiff Car Carriers, for termination and elimination;

b) Encouraged and demanded that target Ford haulaway carriers invest millions of dollars in new tractor-trailer rigs with the promise of additional transportation traffic and complete agreement with increased tariff rates necessary to pay for these acquisitions;

c) Encouraged, required and demanded that target Ford transport carriers invest heavily in real estate and new terminal facilities with the promise of additional transportation traffic and complete agreement with increased tariff rates necessary to pay for these improvements.

d) Dictated and controlled the tariff rates charged by target haulaway carriers in a manner designed to cause target haulaway carriers to operate unprofitably;

e) Refused to allow target haulaway carriers supplemental payments, sometimes referred to as arbitraries, and/or temporary rate adjustments, to compensate for increased costs, fixed cost penalties or adverse economic factors;

f) Approved tariff rates and/or provided additional traffic for non target carriers in order to ensure their continued successful business;

g) Paid defendant and co-conspirator haulaway carriers supplemental payments, sometimes referred to as arbitraries, and/or temporary rate adjustments to compensate for increased costs, fixed cost penalties or adverse economic factors;

h) Interfered with and prevented target haulaway carriers and their affiliates from selling their businesses and assets as going business concerns or prevented target haulaway carriers from consolidation or merger with other carriers;

i) Placed the targeted carriers in such a position as to enable defendant and co-conspirator transport carriers to acquire the businesses and assets of target haulaway carriers at distress prices or for less than fair market value as going business concerns.

20. Defendants have done those things which they combined and conspired to do, including among others:

a) In 1975, after first directing Byrne and Car Carriers to sell the Car Carrier business and assets to another Ford carrier, Ford unreasonably interfered with and prevented a sale to E&L, causing E&L's corporate parent to renege on an executed letter of intent to purchase plaintiff Car Carriers' business and assets, including operating authorities, leased equipment and terminal facilities, all at fair market value;

b) In 1977 and 1978, Ford directed plaintiffs to invest over six million dollars ($6,000,000.00) in new tractor-trailer equipment with the promise that plaintiffs would be able to recover the cost of such equipment with additional transport business and higher tariff rates;

c) In 1979, Ford unreasonably interfered with and prevented plaintiffs from acquiring, as a going business concern, all of the outstanding stock of Automobile Transport, Inc., ("ATI"), Ford's then haulaway carrier from Wayne, Michigan and other origins thereby preventing a carrier consolidation which would have generated valuable back-haul business and resulted in significant operating efficiencies and cost reduction benefits to ATI, plaintiffs and Ford itself;

d) In early 1979, Ford induced Car Carriers to continue extending credit to ATI, at a time when Ford knew ATI was insolvent, upon the misrepresentation that Ford would see to it that Car Carriers would recover all such credit extensions in the event ATI did not repay Car Carriers;

e) In 1979, after blocking an arm's length negotiated sale of ATI to plaintiffs, and being a material factor in

ATI's bankruptcy by first refusing to assist ATI in obtaining higher tariff rates and then abruptly terminating ATI as a Ford haulaway carrier, Ford awarded the substantial portion of ATI's haulaway carrier business to Nu-Car and E&L on the basis of sham and knowingly predatory bids. Because E&L and Nu-Car obtained this business without needing additional equipment, the business and assets of ATI became relatively valueless;

f) Prior to 1980, Ford required Dealers Transport Company to invest in a new terminal facility in the amount of eight hundred fifty thousand dollars ($850,000) and to purchase an additional forty (40) tractor-trailer rigs in the amount of two million eight hundred thousand dollars ($2,800,000). Notwithstanding these requirements, Ford abruptly notified Dealers Transport Company that it was terminated as Ford's haulaway carrier in the south central United States area and awarded Dealers Transport Company's haulaway transport business to Motor Convoy and E&L Transport Company. Consequently, Dealers Transport Company was unable to be offered for sale as an ongoing business;

g) During the entire 1975-1981 period, Ford caused Car Carriers' haulaway operations of new Ford automobiles in Chicago to be unprofitable by refusing to allow adequate published tariff rates or other compensation for Car Carriers' service and refusing to allow adequate temporary rate adjustments;

h) In October, 1981, Ford abruptly cancelled and terminated Car Carriers as the haulaway carrier for Ford's Chicago assembly plant and railheads and awarded its haulaway business to defendant Nu-Car on the basis of a sham and knowingly predatory bid. At the time, Nu-Car had neither suitable equipment, an adequate terminal

facility nor proper operating authority to perform such carrier transport services;

i) In and from March, 1982, in an effort to force Tykely to sell their terminal facility and other assets at distress or less than fair market prices, Ford and Nu-Car have insisted on "walkaway" and other onerous provisions in any agreement by Nu-Car to purchase the Tykely terminal facility, as well as unacceptable covenants and releases of claims of plaintiffs against Nu-Car, Ford and Associated Transport. More recently, Nu-Car, on unimproved property, supplied by Ford but located further from the Ford plant than the plaintiffs' terminal facility, has commenced construction of a duplicative terminal facility which will greatly reduce the value of the Tykely terminal and real estate.

Effects

21. As a result of the aforesaid combination and conspiracy, competition in the business of providing haulaway transport services for new Ford automobiles has been restrained.

Injury to Plaintiffs

22. During the period of the combinations and conspiracies and as a direct consequence thereof, Car Carriers was forced to operate at a substantial economic loss.

23. Plaintiffs invested substantial sums of money in the purchase of new tractor-trailer equipment especially suited for haulaway transport of new Ford automobiles. Plaintiffs also invested substantial sums of money to provide a terminal facility especially and uniquely located for haulaway transport of new Ford automobiles from Ford's Chi-

cago assembly plant and railheads. As a consequence of the combination and conspiracies alleged, plaintiffs are unable to sell or otherwise dispose of such haulaway equipment or facility at fair asset or market value.

24. As a direct and proximate result of the aforesaid combination and conspiracy, plaintiffs have suffered damages in an amount in excess of five million dollars ($5,000,000.00), which amount is, as yet, currently unascertainable.

Count II

25-44. Plaintiff Tykely incorporates by reference Paragraphs 1 through 20 of Count I as if repeated verbatim herein.

45. Count II is brought to recover damages sustained by Tykely as a result of Ford's wrongful and malicious interference with Tykely's business and prospective economic advantages. In addition to jurisdiction of Count II pendant to jurisdiction over Count I, jurisdiction of Count II is conferred upon this Court by 28 U.S.C. §1332.

46. In approximately March, 1982, Tykely and defendant Nu-Car agreed orally to the terms of a lease purchase agreement regarding Tykely's real property and improvements thereon which were previously used by Car Carriers and Clark for their operations involving the haulaway transportation of new Ford automobiles from Chicago. Tykely and Nu-Car had agreed that Nu-Car would lease the property for fifty thousand dollars ($50,000) per month for three months and that Nu-Car would purchase the property for three million dollars ($3,000,000). When defendant Ford became aware of these successful negotiations, it interfered with them and used its status and

"business leverage" as a principal patron of Nu-Car to interpose a number of unprivileged and wrongful demands as conditions precedent to the consummation of the lease-purchase of Tykely's property, all with the same motives previously set forth in Paragraphs 19 and 20 herein. In particular, Ford wrongfully and maliciously demanded that Car Carriers and Clark join in the Tykely transaction and that they unconditionally relinquish any and all rights to present grievances to, and seek relief from, federal and state regulatory bodies and courts having jurisdiction over those matters.

47. As a result of those conditions precedent which were imposed by Ford, the oral agreement could not be effectuated and Tykely was unable to sell or lease the real property, previously described, to Nu-Car pursuant to the parties' oral agreement.

48. Because of the uniqueness of the Tykely real property to companies engaged in the motor transportation of new Ford automobiles manufactured at the Ford Chicago assembly plant, Tykely's business opportunity has been forever lost.

49. This conduct has damaged Tykely in the approximate amount of three million dollars ($3,000,000.00). In view of the willful and malicious nature of Ford's conduct in depriving Tykely of its ability to sell its real property at a value at or near fair market for use as an automobile haulaway transport terminal, substantial punitive damages, an amount as yet unascertained, are appropriate.

Count III

50-69. Plaintiffs incorporate by reference Paragraphs 1-20 of Count I as if repeated verbatim herein.

70. Count III is brought to recover damages caused by Ford's malicious interference with plaintiffs' prospective business advantage resulting from its 1975 agreement and letter of intent with the corporate parent of E&L regarding the sale of the Car Carriers' business to E&L's corporate parent.

71. In 1975, plaintiffs entered into negotiations to sell Car Carriers' business and assets, together with its leased equipment and terminal facility, to E&L's parent company. E&L, at that time, was a carrier providing haul-away service for Ford. E&L's parent agreed to the purchase for net asset value, executed a letter of intent and set a date for closing. After the letter of intent was signed, but before the closing, Ford intentionally and maliciously interfered with the sale by applying coercive and predatory tactics to prevent E&L from consummating the purchase. Ford further caused E&L to lose all interest in the purchase of Car Carriers by representing that Ford was going to bankrupt Car Carriers and afterwards E&L could pick up Car Carriers' assets at distressed prices.

72. By using these coercive and predatory tactics Ford discouraged and prevented other carriers in the Ford system from purchasing Car Carriers. Accordingly, it was virtually impossible for plaintiffs to sell Car Carriers or its business for any reasonable price from 1975 through 1981.

73. Ford wrongfully concealed its predatory action of refusing to allow E&L or other carriers to consolidate their operations with Car Carriers and subsequently represented to plaintiffs that Ford intended to continue doing business with them and that Ford looked forward to a long and mutually beneficial relationship with plaintiffs.

74. Due to Ford's concealment of its action in disapproving the E&L consolidation and the predatory intent underlying its disapproval of the E&L-Car Carriers consolidation, plaintiffs did not learn of Ford's true intent in disapproving the 1975 transaction until September, 1981.

75. As a direct and proximate result of Ford's malicious, wrongful and predatory interference with plaintiffs' efforts to sell the Car Carriers' business and related assets in 1975, and thereafter, plaintiffs were damaged in one or more of the following ways:

a) Plaintiffs were compelled to direct substantial amounts of their time, effort and capital to provide haul-away transportation services on Ford's behalf as opposed to directing attention to other, more profitable ventures;

b) Plaintiffs were denied the benefit of the sale which they had agreed upon with E&L's parent in 1975 and thus were not only denied the ability to exercise other, more profitable business opportunities available to them at that time, but also were forced to sell other businesses because Ford's malicious interference with the E&L transaction affected plaintiffs' credit in such an adverse manner that they could not continue to operate such other business;

c) Plaintiffs were compelled to continue their ownership and operation of the Car Carriers business at a loss.

76. Due to the actions of Ford as described above in Paragraphs 50-75, plaintiffs have been damaged in an amount in excess of five million dollars ($5,000,000.00) which amount is, as yet, unascertainable. Further, given the willful, malicious and predatory conduct of Ford and its fraudulent concealment of such conduct and predatory intent, substantial punitive damages in an amount not yet ascertained are appropriate.

Count IV

77-96. Plaintiffs incorporate by reference Paragraphs 1-20 of Count I as if repeated verbatim herein.

97. Count IV is brought to recover damages caused by Ford's breach of its fiduciary duty to plaintiffs or, alternatively, its duty to deal fairly and in good faith with plaintiffs. This Court has jurisdiction of Count IV, pendant to its jurisdiction over Count I.

98. While demanding that plaintiffs make substantial additional investments in 1977 and later years, investments which it knew could only be amortized over an extended period of time, Ford represented to plaintiffs that it intended to continue to patronize Car Carriers and Clark as it had in the past, that Ford indicated that they would enjoy increased Ford business, and that Ford would allow plaintiffs to publish the rate increases necessary for them to pay for these investments. Substantially the same representations were made by Ford under oath before the Interstate and Illinois Commerce Commissions. In making the investments demanded by Ford, plaintiffs relied upon and believed those representations, and, in taking the regulatory actions sought by Ford, the Commission likewise relied upon and believed those representations.

99. Car Carriers had furnished motor transportation to Ford for many years, and Clark had been regularly furnishing such services to Ford for several years. Car Carriers and Clark relied upon Ford's representations that Ford would increase their business, that Ford would deal with them fairly and in good faith, by giving recognition of investments made and liabilities incurred by plaintiffs at Ford's demand including potential ERISA liability and that plaintiffs would be compensated fairly and reasonably for the services so provided.

100. By reason of the domination and control of plaintiffs by Ford, the course of dealing between the parties, and the trust and confidence reposed by plaintiffs in Ford, of which Ford was aware and which it invited, Ford owed plaintiffs a fiduciary duty of fair dealing and a duty to deal fairly and in good faith with them.

101. Ford's willful violation of its fiduciary duty has damaged plaintiffs in an amount in excess of five million dollars ($5,000,000.00) which amount is, as yet unascertainable. Further, given the willful and malicious nature of Ford's conduct, substantial punitive damages are appropriate, in an amount as yet unascertained.

Count V

102-121. Plaintiffs incorporate by reference Paragraphs 1-20 of Count I as if repeated verbatim herein.

122. Count V is brought to recover damages based on promissory estoppel. This Court has jurisdiction of Count V pendant to its jurisdiction over Count I.

123. In 1977 and 1978, Ford directed carriers, such as Car Carriers, targeted for termination, to secure additional tractor-trailer combinations for hauling Ford traffic based upon representations of additional traffic. Ford's demand on these carriers to secure such equipment constituted Ford assurance to these carriers and their financial sources that the carriers would receive sufficient additional traffic and/or be allowed to publish rate increases to amortize the cost of the equipment they were directed to secure.

124. Ford's representations to plaintiffs were deliberately false, fraudulent, and malicious and/or were

made with the intent to deceive, in that Ford had already decided to discontinue patronizing Car Carriers. With predatory intent, Ford set out to induce substantial additional investments in equipment for use in the motor haulaway businesses of plaintiffs in order to maximize the losses which would be sustained when Ford withdrew its patronage. Ford also sought by such conduct to maximize the motor haulaway assets which could later be acquired at distress prices by Ford, or by Nu-Car and others for Ford's benefit.

125. In making these representations, Ford knew and expected that the plaintiffs would rely on said representations to their detriment.

126. Pursuant to Ford's inducements, plaintiffs paid over six million dollars ($6,000,000.00) for the additional tractor-trailer units which, in light of plaintiffs' dependence upon Ford, were primarily suitable for use in transporting new automobiles manufactured by Ford. Contrary to its representations, Ford never furnished the additional traffic and did not allow publication of rate increases to permit plaintiffs to amortize the cost of the equipment it purchased pursuant to Ford demands. Nor did Ford pay Car Carriers any arbitraries or lump sum payments in recognition of adverse economic factors, a Ford practice upon which it had encouraged its carriers to rely and upon which Car Carriers detrimentally relied.

127. As a result of plaintiffs' reliance on Ford's fraudulent and deceitful representations, the plaintiffs suffered damages in the amount in excess of five million dollars ($5,000,000.00) which amount is, as yet, unascertainable.

Count VI

128-147. Plaintiffs incorporate by reference Paragraphs 1-20 of Count I as if repeated verbatim herein.

148. Count VI is brought to recover the amount Ford agreed to pay for transportation services and maintenance and use of terminal facilities which plaintiffs furnished at Ford's order or, alternatively, the reasonable value of those services which Ford received from plaintiffs at its request. This Court has jurisdiction of Count VI pendant to its jurisdiction of Count I.

149. Under dates of November 11, 1981 and November 23, 1981, plaintiffs submitted their statements to Ford in total amount of $1,128,487.53 for transportation services and maintenance and use of terminal facilities which they had furnished to Ford at Ford's request and on its order. At or before the time of its request for such services and facilities, Ford agreed to pay for services and maintenance and use of facilities at a reasonable value. Such services and facilities use were reasonably worth at least that amount.

150. Ford has failed and refuses to pay for such services and facilities which were in fact provided to it.

151. By the acts and practices set forth above, Ford has breached its agreement to pay for such services and facilities in the total amount of $1,128,487.53, and plaintiffs have been injured in that amount. Alternatively, plaintiffs are entitled to recover that amount from Ford as the reasonable value of services and facilities provided by them to Ford at its request.

Respectfully submitted,

/s/ McConnell, Ruberry & Jansen
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Clark Transport Co., Inc.
Carrier Equipment Co.
Transco Corporation
JPB Corporation
James P. Byrne
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(Plaintiffs)

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APPENDIX B

The statutory and rule provisions involved are:

Section 1 of the Sherman Act, 15 U.S.C. §1, providing in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . .

Section 4 of the Clayton Act, 15 U.S.C. §15, providing:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Rule 12(b)(6) of the Federal Rules of Civil Procedure, providing in pertinent part:

> . . . (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted . . .

FILED
FEB 27 1985
STEVAS,
CLERK

No. 84-1213 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CAR CARRIERS, INC., *et al.*,
Petitioners,

v.

FORD MOTOR COMPANY and
NU-CAR CARRIERS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT NU-CAR CARRIER, INC.'S BRIEF IN OPPOSITION

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February 27, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

13pp

QUESTION PRESENTED

Whether the Court of Appeals in affirming the dismissal of an antitrust claim which did not assert a *per se* violation and did not allege any facts constituting injury to competition committed any legal error that calls for the exercise of this Court's jurisdiction.

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IN THE

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OCTOBER TERM, 1984

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CAR CARRIERS, INC., *et al.*,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT NU-CAR CARRIER, INC.'S BRIEF IN OPPOSITION

STATEMENT

Respondent Nu-Car Carriers, Inc. ("Nu-Car")[1] respectfully requests that this Court deny the Petition for Certiorari, docketed January 25, 1985, seeking review of a decision by the United States Court of Appeals for the Seventh Circuit affirming the dismissal of an antitrust complaint filed by petitioners (collectively referred to as "Car Carriers").

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[1] Pursuant to Rule 28.1, Nu-Car states its parent corporation is the Lishon Corporation, a Pennsylvania corporation, and it has no publicly-owned affiliates or subsidiaries.

This case fundamentally involves a disappointed bidder's claim that a purchaser of transportation services, Ford Motor Company ("Ford"), conspired with Nu-Car, another bidder, to eliminate the previous service vendor, Car Carriers, and to violate the antitrust laws. As the Seventh Circuit realized, "when stripped to its essential allegations, the complaint does no more than state plaintiff's commercial disappointment at losing [Ford's] patronage." [2]

The complaint alleged that Car Carriers transported new Ford vehicles from Ford's plants and railheads in the Chicago area to Ford dealerships in that area from 1968 until October 1981. According to the complaint, Ford had the power to "dictate and control" the rates charged by Car Carriers and others either by formally opposing any rate increase sought before the federal or state regulatory agencies or by unilaterally terminating the carriers. Complaint ¶¶ 19(d)-(g), Pet. App. at A37.

The complaint charged that in as early as 1975 defendants and their co-conspirators engaged in a conspiracy to restrain trade in the business of providing haulaway motor transportation for new Ford automobiles and to injure or destroy the business of Car Carriers and certain other similarly situated Ford carriers. *Id.* at ¶ 19. The defendants purportedly employed several methods of implementing their common goal. First, Ford required the carriers selected for elimination (the so-called "target carriers") to make substantial investments in new tractor-trailer equipment, real estate and new terminal facilities. In return, Ford would promise additional transportation traffic and "complete agreement with increased tariff rates necessary to pay for these acquisitions." Complaint ¶¶ 19(b), (c), Pet. App. at A36-37. After the target carriers made these investments, however, Ford

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[2] Pet. App. at A16, *quoting* Dunn & Mavis, Inc. v. Nu-Car Drivaway, Inc., 691 F.2d 241, 243 (6th Cir. 1982).

allegedly would then prevent them from obtaining the rate increases necessary for profitable operations. *Id.* at ¶¶ 19(d), (e), Pet. App. at A37.

Second, Ford purportedly interfered and prevented the target carriers from selling businesses and assets and preventing mergers that were in their business interests. *Id.* at ¶ 19(h). Finally, Ford would terminate its relationship with the target carrier, thereby allowing favored carriers to acquire the business at distress prices or for less than fair market value as going business concerns. *Id.* at ¶ 19(i).

The complaint asserted that Car Carriers was destroyed following this pattern. In 1975, Ford directed Car Carriers to sell assets and businesses to a second Ford carrier. Car Carriers allege that Ford unreasonably interfered with and prevented the consummation of this supposed agreement. Complaint, ¶ 20(a), Pet. App. at A38. In 1977 and 1978, Ford induced Car Carriers to purchase $6 million of new equipment. *Id.* at ¶ 20(b). However, Ford purportedly caused Car Carriers' operations in Chicago to be unprofitable through its refusal to allow adequate published tariff rates or other compensation. *Id.* at ¶ 20(g), Pet. App. at A39.

In 1981, Ford solicited bid proposals for Chicago's haulaway business from Car Carriers and other car transporters. In October of 1981, Ford awarded the haulaway contract for the Chicago area to Nu-Car and terminated Car Carriers. According to the complaint, this was on the basis of Nu-Car's "sham and knowing predatory bid." *Id.* at ¶ 20(e), Pet. App. at A38-39. To minimize the losses from the termination, Car Carriers attempted to sell their facilities and other assets to Nu-Car. However, the effort was frustrated when Ford and Nu-Car purportedly insisted on "walkaway and other onerous provisions . . . as well as unacceptable covenant releases of Car Carriers claims." *Id.* at ¶ 20(i), Pet. App. at

A39. These allegations are the heart of Car Carriers' complaint, particularly against Nu-Car.

Both defendants moved to dismiss the complaint for failure to state a claim. The District Court granted the motion under Federal Rule of Civil Procedure 12(b)(6) with prejudice. Pet App. at A21-30.

The Seventh Circuit affirmed. While recognizing that summary procedures should be used sparingly in antitrust litigation, it refused to provide such litigation an exemption from Federal Rule of Civil Procedure 12(b)(6).[3] The court realized that the "fundamental requirement at issue in this dispute is that of a sufficient allegation of anticompetitive effects that would result or have resulted from the defendants' actions." Pet. App. at A10.

The court indicated that the only exception to the requirement is when the plaintiff adequately states a *per se violation.* (Pet. App. at A11.) The Seventh Circuit examined the complaint and found that plaintiffs had not "alleged a price fixing scheme, and price-cutting by Car Carriers was in no way a factor in its dispute with Ford. (Pet. App. at A12.) In fact, "the market structure described in the complaint is not analogous to a hierarchy of manufacturers, distributors, or resellers. Ford is simply a purchaser of hauling services and the plaintiffs are sellers of those services." Pet. App. at A3.

The court refused to accept the *per se* labels that Car Carriers attempted to paste onto the complaint. The Court recognized that

> The complaint simply states that Ford elected to replace its exclusive haulaway transporter for the Chicago area with another carrier on the ground that the original carrier continually sought higher prices then Ford was willing to pay. Ford obviously entered into an initial "agreement" with Nu-Car that

[3] Pet. App. at A8-9.

> resulted in the elimination of Car Carriers, but the same could be said of any similar exclusive arrangement when the original supplier of services is replaced by another.

Id. The fact that no one purchased Car Carriers' assets after their termination by Ford was also found by the court to be insufficient to constitute a refusal to deal for antitrust purposes. Pet. App. at A13-14.

The Seventh Circuit then analyzed the complaint under the rule of reason and found no anticompetitive effects: "Losing business to a competitor is an inevitable consequence of the economic system." Pet. App. at A14. The court recognized that Car Carriers was "alleging, in essence, that Ford conspired to injure itself." Pet. App. at A15. The court concluded that the finding that the complaint stated a Section 1 claim would severely limit "a buyer's right to displace an old seller in favor of a new one" and "would undermine the principles of competition the antitrust laws were designed to secure." [4]

REASONS THE WRIT SHOULD NOT BE GRANTED

Put bluntly, the Petition for Writ of Certiorari is frivolous and does not require the devotion of this Court's limited resources. Car Carriers allege that the Seventh Circuit erroneously required them to allege injury to competition to state an antitrust claim under the Rule of Reason. Second, they claim that the court below disregarded this Court's teachings in *Conley v. Gibson*, 355 U.S. 41 (1957) and *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962) in dismissing the complaint under Federal Rule of Civil Procedure 12(b)(6). Car Carriers' tortured arguments have no merit.

I. The major thrust of Car Carriers' petition is that the decision below directly conflicts with this Court's decisions in *Radiant Burners, Inc. v. Peoples Gas Light*

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[4] Pet. App. at A16, *quoting* Dunn & Mavis, *supra*, 691 F.2d at 244.

and Coke Company, 364 U.S. 656 (1961), *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), and *Radovich v. National Football League*, 352 U.S. 445 (1957) by requiring a plaintiff in a non-*per se* case to allege injury to the market, *i.e.*, injury to competition.

To the contrary, the Seventh Circuit merely followed this Court's admonition that the antitrust laws were designed to protect competition, not merely competitors. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *see also* Pet. App. at A14. It is now clear beyond peradventure that when a claim is judged under the rule of reason, it requires a determination whether the alleged practice constitutes an unreasonable restraint on competition. *See, e.g., Monsanto Company v. Spray-Rite Service Corp.*, —— U.S. ——, 104 S. Ct. 1464, 1469 (1984); *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, —— U.S. ——, 103 S. Ct. 897 (1983); *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

The cases Car Carriers invoke all involved *per se* violations. *Klor's, supra*, involved a *per se* violation of the antitrust laws—a group boycott—a practice as to which "Congress had determined its own criteria on public harm and it was not for the courts to decide whether in an individual case injury had actually occurred." 359 U.S. at 211. *Radiant Burners, supra*, relied upon *Klor's* and again involved a *per se* violation, which is why this Court forebore analysis of plaintiffs' averments of adverse market impact. 364 U.S. at 659-60. Finally, *Radovich, supra*, also involved a group boycott constituting *per se* violations. 352 U.S. at 453.

In the last paragraph of their first point, Car Carriers attempt to suggest that they had asserted a *per se* claim in the allegations that other carriers "boycotted" the sale of their property after they lost the Chicago business.

(Pet. App. at A9.) The refusal to buy property is simply not "an effort to exclude or cause disadvantage to one or more competitors by cutting them off from trade relationships which are necessary to any firm trying to compete." L. Sullivan, *Handbook of the Law of Antitrust*, 260 (1977).

II. Stripped to its essence, Car Carriers' second argument is that the antitrust laws constitute an exception to Federal Civil Procedure 12(b)(6). That is the only way the Seventh Circuit opinion could be "in conflict" with this Court's *Conley* and *Poller* decisions.

The actual facts are otherwise. The Seventh Circuit recognized the standards set forth in those decisions, gave Car Carriers the benefit of all inferences, but still required an actual claim be stated. In so doing, it followed the Fifth Circuit's apt characterization that "a complaint . . . must contain direct or influential allocations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory." *In re* Plywood Antitrust Litigation, 655 F.2d 627, 641 (5th Cir. 1981), *cert. dismissed*, —— U.S. ——, 103 S. Ct. 3100 (1983); *see* Pet. App. at 8.

From the beginning, Car Carriers' antitrust claim has had several bizarre elements. It defined a market in which one co-conspirator, Ford, is not only the sole consumer in the relevant market, but also has sufficient economic power to dictate the terms of its dealings with all its carriers, targets and co-conspirators alike. Nonetheless, Car Carriers allege that Ford conspired to injure itself and that the overt act in furtherance of that so-called conspiracy was one of protecting its own economic interest and terminating Car Carriers in order to lower its own transportation costs. As the courts below found, Car Carriers' *own* affirmative allegations demonstrated conclusively that their alleged injury is not of the type of anticompetitive injury the antitrust laws were intended to forestall.

CONCLUSION

The Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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(3)

No. 84-1213

IN THE

Supreme Court of the United States

October Term, 1984

CAR CARRIERS, INC., ET AL.,

Petitioners,

v.

FORD MOTOR COMPANY and NU-CAR CARRIERS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE DISMISSAL OF THE ANTITRUST COUNT IN PETITIONERS' COMPLAINT FOR FAILURE TO STATE A *PER SE* VIOLATION OF THE SHERMAN ACT, OR TO ALLEGE ANY INJURY TO COMPETITION, WAS CONSISTENT WITH THE DECISIONS OF THIS COURT.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

SUPPLEMENTAL STATEMENT OF THE CASE

This case arose from the setting of a former supplier[1] alleging that a purchaser[2] transferred its patronage to a replacement supplier[3] pursuant to a conspiracy. The facts alleged in the Complaint were assumed by the courts below to be correct, as they are for purposes of this Brief in Opposition to the Petition for a Writ of Certiorari. Dismissal of the Complaint was unanimously

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[1] Plaintiffs-Petitioners, collectively referred to herein (as in the courts below) as "Car Carriers."

[2] Defendant-Respondent Ford Motor Company, referred to herein as "Ford."

[3] Defendant-Respondent Nu-Car Carriers, Inc., referred to herein as "Nu-Car."

upheld by a panel of the Seventh Circuit Court of Appeals, and no judge voted for rehearing en banc.

The Complaint alleged that Ford, in purchasing transportation services from a number of suppliers, effectively "dictated and controlled" the rates Ford paid to them, and terminated or otherwise dealt severely with those who sought rates Ford deemed to be excessive. The Complaint alleged that Ford's 1981 decision to accept Nu-Car's "predatory" lower rates, and transfer its Chicago haulaway transport business from Car Carriers to Nu-Car, was based on a conspiracy entered at least six years earlier with Nu-Car and with other carriers who, like Car Carriers, bid unsuccessfully for that business. Although the conspiracy purportedly was intended to force Car Carriers to sell its assets to Nu-Car, Ford allegedly prevented this from occurring. (Complaint ¶¶ 19, 20; A.36-40)[4] The sole alleged effect on competition from the conspiratorial acts was that "competition in the business of providing haulaway transport services for new Ford automobiles has been restrained." (Complaint ¶ 21; A.40)

Ford moved to dismiss Petitioners' antitrust count for failure to state a claim upon which relief could be granted on the grounds, *inter alia*, that the Complaint alleged an injured "market" consisting solely of Ford itself, which had sufficient power to prevent its carriers from charging supracompetitive rates. The antitrust count was dismissed because, as the Seventh Circuit found, it did not state a *per se* violation of the antitrust laws and:

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[4] References to the Appendix included with the Petition are cited herein as "A.__".

> The fatal flaw in these pleadings is the absence of any allegation, either direct or inferential, of an anticompetitive effect.

745 F.2d at 1109 (A.14).

REASONS FOR DENYING THE WRIT

Car Carriers' Petition fails to meet the standards of Supreme Court Rule 17.1 which sets forth the factors to be considered in passing upon petitions for writs of certiorari. Petitioners offer no "special and important" reasons for granting the writ of certiorari, as required by the rule. The sole reason offered is a specious conflict between the opinion below and certain of this Court's decisions, although no judge below was persuaded that such a conflict existed. On the contrary, the Seventh Circuit's opinion was wholly consistent with this Court's requirements for a Sherman Act claim on either a *per se* or Rule of Reason basis.

A. THE SEVENTH CIRCUIT PROPERLY APPLIED THIS COURT'S STANDARDS FOR STATING A SHERMAN ACT CLAIM UNDER A *PER SE* OR RULE OF REASON STANDARD.

This Court has unequivocally required anticompetitive market impact as a necessary predicate to any violation of Section 1 of the Sherman Act. Under the Rule of Reason, it is an element that must be alleged and proved. Market injury need not be proved in the case of a *per se* violation; not because it is not required, but because experience has shown it will inevitably result in such cases. As the Court recently explained:

> Both *per se* rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint." . . .

> *Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But *whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same* — whether or not the challenged restraint enhances competition. Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.
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> * * *
>
> . . . "[C]ongress designed the Sherman Act as a 'consumer welfare prescription.'" A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.

National Collegiate Athletic Association v. *Board of Regents*, ___ U.S. ___, 52 U.S.L.W. 4928, 4933-34 (1984) (citations omitted, emphasis added).

The Seventh Circuit carefully examined the averments of the Complaint under both *a per se* and Rule of Reason analysis, and concluded that Petitioners could not state a claim under either. The Petition does not take issue with the Seventh Circuit's Rule of Reason analysis, which concluded:

> [T]he complaint does not in any way set forth facts to support the conclusion that this putative conspiracy had any anticompetitive effect. Specifically, there are no allegations that, having terminated Car Carriers in favor of Nu-Car, Ford [the sole consumer in the alleged "market"] was compelled, or would be compelled, to pay prices

> that were not the result of the competitive process.

745 F.2d at 1109-10 (A.15).

As they did unsuccessfully in the lower courts, Car Carriers again contend that no injury to the market is necessary, and that they were required only to allege "a combination and conspiracy between Ford and other Ford carriers to eliminate and destroy the transport business of petitioners . . . and damage sustained by petitioners as a consequence," citing *Radiant Burners, Inc.* v. *Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); and *Radovich* v. *National Football League*, 352 U.S. 445 (1957) (Pet. at 6-9). These cases involved classic horizontal group boycott conduct that "falls within one of the 'classes of restraints which from their "nature or character" [are] unduly restrictive, and hence forbidden . . .'" *Radiant Burners*, 364 U.S. at 659 (quoting *Klor's*, 359 U.S. at 211). That is to say, each of those cases involved recognized *per se* violations which will *inevitably* have anticompetitive market impact.

In *Radiant Burners*, competitors of the plaintiff conspired with gas companies to prevent consumers from using the plaintiff's burner. In *Klor's*, the plaintiff's suppliers conspired together and with its competitor to prevent the plaintiff from obtaining merchandise to sell to the public. In *Radovich*, football leagues conspired to prevent their teams from employing those who had played in a competing conference in order to deprive spectators of competing leagues. The facts in these cases differ fundamentally from those alleged in the Complaint in this case. Because the Complaint defines a "market" in which Ford is the only purchaser, any decision by Ford to use one supplier rather than another will by definition "eliminate" the disfavored supplier from the market.

As many courts have held, a "conspiracy" with a buyer or seller to deal with it rather than another is not a *per se* violation of the Sherman Act. *See, e.g., Dunn & Mavis, Inc.* v *Nu-Car Driveaway, Inc.*, 691 F.2d 241 (6th Cir. 1982); *Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981); *Ron Tonkin Gran Turismo, Inc.* v. *Fiat Distributors, Inc.*, 637 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981); *Burdett Sound, Inc.* v. *Altec Corp.*, 515 F.2d 1245 (5th Cir. 1975). In an effort to avoid the holdings in such cases, Car Carriers alleged not only a conspiracy involving Ford and Nu-Car (who won the bid to replace Car Carriers) but a curious "horizontal" conspiracy which included other carriers (who, like Car Carriers, also lost the Chicago bid to Nu-Car).[5] In effect, Car Carriers argued that a total lack of injury to competition could be alchemized into a *per se* violation merely by alleging that Ford conspired with losing bidders as well as with the winning bidder. The Seventh Circuit opinion followed well-accepted authority construing the requirements of *per se* offenses in finding that no claim under the Sherman Act was stated by this allegation.

Under Car Carriers' unduly broad reading of *per se* violations, purchasers would be barred from ever entering into exclusive supply arrangements in which the original supplier of services is replaced under an agreement with two or more sellers by which the buyer's requirements will be met — regardless of the arrangements' potential pro-competitive benefits. *See Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 329-34 (1961); *Standard Oil Co.* v. *United States*, 337 U.S. 293, 306-07

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[5] The belated suggestion in Footnote 2 of the Petition of "market allocation" of Ford's shipping needs among carriers disregards the Complaint's allegation that Ford had power to control the "allocation" of its business among its suppliers.

(1949). The unprecedented rule that Car Carriers would have this Court espouse would interfere with a broad spectrum of wholly legitimate business relationships and ignore longstanding Rule of Reason treatment of exclusive dealing. *Per se* treatment should be accorded only to conduct that, according to long judicial experience, inevitably restrains trade without offering offsetting benefits. *See Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). Car Carriers has failed to plead any such conduct in this case.

The Seventh Circuit correctly identified Petitioners' invocation of *per se* authorities as an effort in mislabeling, closely following this Court's warning in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 59 (1977), that *per se* treatment must be "based upon demonstrable econonic effect rather than . . . upon formalistic line drawing."

B. THE SEVENTH CIRCUIT'S DISMISSAL OF THIS CASE, IN ACCORDANCE WITH THE FEDERAL RULES, POSES NO CONFLICT WITH THIS COURT'S DECISIONS.

The second alleged conflict with this Court's decisions advanced by the Petition is that the Seventh Circuit's opinion "conflicts in principle with the decisions of this Court in *Conley* v. *Gibson*, 355 U.S. 41 (1957) and *Poller* v. *Columbia Broadcasting Sys.*, 368 U.S. 464 (1962)." (Pet. 9). Again, no conflict exists. As the Seventh Circuit correctly recognized, *Conley* does not stand for the proposition that a complaint is sufficient if some unpleaded claim could be formed under some unalleged set of facts. Rather, while the complaint "need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided," a complaint is only sufficient if *its allega-*

tions would state a claim if supported by the facts. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216 at 120-21 (1969).

In *Conley*, the Court held that a cause of action would be stated *"[i]f these allegations are proven."* 355 U.S. at 46 (emphasis added). Thus, "the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." Wright & Miller, *supra*, at 123 (cited in *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 246 (1980)). *See also In Re Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir. 1981), *cert. granted on other grounds and dismissed*, 103 S. Ct. 3100 (1983).

While this Court has admonished that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed," *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983), in this case both the district court and the Seventh Circuit indulged every presumption in favor of the Complaint.[6] Mindful of the Court's admonition in *Poller*, the Seventh Circuit expressly stated that its dismissal was not based upon a finding that the Complaint's allegations of concerted action were deficient (745 F.2d at 1107 n.4; A.10), but on its finding that those allegations, even if proved, could not state a *per se* violation or allege the requisite anticompetitive effect of a Rule of Reason claim. (745 F.2d at 1109-14; A.14-15) Thus, Car Carriers' Complaint was dismissed

[6] The district court even went so far as to permit Car Carriers to "flesh out" their boilerplate conspiracy claim in their briefs, which contained additional allegations wholly outside the Complaint itself. (561 F. Supp. at 886 n.2; A.22)

not for vagueness of expression, but because Car Carriers' own allegations made it clear that they could not state a Sherman Act claim. Dismissal of Car Carriers' Complaint was fully warranted under Fed. R. Civ. P. 12(b)(6), and therefore, the Seventh Circuit's affirmance of that dismissal presents no controversy worthy of this Court's discretionary review.

CONCLUSION

For the foregoing reasons, respondent Ford Motor Company respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

LIST OF SUBSIDIARIES
(Other than Wholly Owned Subsidiaries)
AND AFFILIATES OF FORD MOTOR COMPANY
(U.S. Sup. Ct. Rule 28.1)

The principal affiliates and subsidiaries of Ford Motor Company (other than wholly owned subsidiaries or corporations in which all the stock not held by Ford Motor Company is held by dealers of Ford products) are as follows:

Ford Motor Company of Canada, Limited
Oakville, Ontario, Canada

Ford Brasil, S.A. Sao Bernardo Do Campo, Brazil

Ford-Werke, A.G. Cologne, Germany

Ford Motor Company (Belgium) N.V.
Antwerp, Belgium

Ford Motor Company A/S Copenhagen, Denmark

O/Y Ford A/B Helsinki, Finland

Ford Motor Company Aktiebolag
Stockholm, Sweden

Ford Nederland B.V. Amsterdam, The Netherlands

Eleveth Taconite Company Eveleth, Minnesota

Ford Lio Ho Motor Company Ltd. Taipei, Taiwan

Fairlane Town Center (A Partnership)
Dearborn, Michigan

Renaissance Center Partnership
Dearborn, Michigan

Fairlane Woods Associates (A Partnership)
Dearborn, Michigan

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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In The

Supreme Court of the United States

October Term, 1984

CAR CARRIERS, INC., et al.,

Petitioners,

v.

FORD MOTOR COMPANY and NU-CAR CARRIERS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

Respondents seek to rationalize this Court's holdings in *Radovich, Klor's* and *Radiant Burners* with the decision of the Court below by both arguing that the complaint does not state a *per se* offense and that the holdings in those cases are limited to *per se* offenses. Neither premise is correct.

Market allocations and group boycotts have always been considered to be illegal *per se*. No market analysis nor proof of market impact is required to establish the unreasonableness of such restraints. They are presumed to be unduly restrictive. *United States v. Topco Associates*, 405 U.S. 596 (1972); *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Here, petitioners alleged that they were eliminated as a Ford transport carrier and that their business was destroyed pursuant to a market allocation

and group boycott among Ford and co-conspirator carriers. This is not a case of unilateral termination by Ford and substitution of a rival carrier. Nor is it a case of Ford simply awarding an exclusive contract for its Chicago transport business. What is alleged is a division and allocation of Ford's transport business among the conspirator carriers pursuant to a combination and scheme which enabled such carriers to acquire the business and assets of target carriers at below market prices (Complaint ¶¶19, 20; A. 36-37; 38-40). The combination drove petitioners and others out of business and prevented them from selling their transport equipment and terminal facilities except at distress prices. *Klor's*, 359 U.S. at 213.

To hold, as did the Court below, that such joint action to carve up and allocate the transport business of target carriers fails to state a claim, either *per se*, or under the Rule of Reason, because of lack of "market injury" is to make a mockery of the antitrust laws. The fact that Ford may benefit temporarily by paying lower transport rates because of the resulting lower capital acquisition and amortization costs of the conspirator carriers cannot justify such concerted activity as "procompetitive." Most conspiracies have actual or perceived economic benefits to the conspirators. Nor can petitioners' destruction be rationalized on the ground that they are only a single carrier "whose business is so small that [their] destruction makes little difference to the economy." *Klor's*, 359 U.S. at 213.*

* Surely, it cannot be denied that a conspiracy between Ford and half of its dealers to eliminate the other half and thereby to acquire their businesses and assets at distress prices would state a claim for relief under the antitrust laws, even if it could be argued that there were substantial economic benefits to both Ford and the conspirator dealers from such elimination and consolidation. The complaint alleges an analogous combination and restraint.

Respondents' attempt to limit this Court's holdings in *Radovich, Klor's* and *Radiant Burners* to *per se* situations is similarly flawed. There is nothing in the language of these decisions to suggest the Court intended to restrict the holding to *per se* cases. If the challenged restraint is deemed unduly restrictive either under a *per se* standard or Rule of Reason analysis, no separate allegation or showing of public injury is required. Here, the Court below equated public injury with market injury and found the complaint deficient for failure to allege an "injury to the market as well," an erroneous holding since this Court has held that "the right of recovery of a plaintiff in a treble damage antitrust case does not depend at all on proving an economic injury to the public." *In re McConnell,* 370 U.S. 230, 231 (1962).

CONCLUSION

For the reasons stated in the Petition and this Reply, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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